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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 752

RIN 3206–AL39

Adverse Actions

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations governing Federal adverse actions. The final regulations clarify the adverse action rules regarding reductions in pay. In addition, the final regulations remove unnecessary subparts pertaining to statutory requirements, make a number of technical corrections, and utilize consistent language for similar regulatory requirements. The changes also include various revisions to make the regulations more readable.

DATES: *Effective Date:* The rule is effective February 2, 2010.

FOR FURTHER INFORMATION CONTACT: Sharon Hall by telephone at (202) 606–2930; by FAX at (202) 606–2613; or by e-mail at *CWRAP@opm.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

On September 18, 2008, OPM published at 73 FR 54075 (2008) proposed amendments to the regulations in part 752 of title 5, Code of Federal Regulations (CFR), to clarify the adverse action rules regarding reductions in pay and indefinite suspension, remove unnecessary subparts pertaining to statutory requirements, make technical corrections, utilize consistent language for similar regulatory requirements, and make the regulations more readable. The public comment period on the proposed amendments ended on November 17, 2008. OPM received comments from four Federal agencies or departments, four unions, an employment law attorney, and a professional organization of attorneys specializing in employment law. OPM has carefully considered the comments received.

Amendment To Clarify Adverse Action Rules Regarding Reduction in Pay

OPM proposed to amend 5 CFR 752.401(b)(15), to clarify that a reduction in an employee's rate of basic pay resulting from the application of The Federal Workforce Flexibility Act (Pub. L. 108–411, October 30, 2004) and implementing regulations is excluded from adverse action coverage. We received no comments on this proposed change. One agency recommended that we also modify 5 CFR 752.401(b)(2) to substitute the term ''pay'' for ''grade'' and thereby extend the exclusion to pay-banded systems as well as systems using grades. This recommendation is outside the scope of the current proposed regulation and therefore has not been considered.

Amendment To Clarify Adverse Action Rules Regarding Indefinite Suspension

OPM proposed to revise the regulations to clarify that the ''crime provision'' at 5 U.S.C. 7513(b)(1) is an exception only to the general 30-day notice requirement for taking adverse actions and that it does not set a higher or separate standard of proof for indefinite suspensions.

OPM also proposed a ''Standard for Action'' to list examples of serious misconduct for which an indefinite suspension could be an appropriate action. These examples were the types of misconduct that would pose a specific significant and ongoing risk.

We received comments regarding the proposed clarification of OPM regulations on this topic. Several commenters stated that OPM's interpretation of the law represented an unwarranted expansion of the grounds for indefinite suspension based on an overreaching interpretation of the Federal Circuit Court of Appeals' decision in *Perez* v. *Department of Justice,* 480 F.3d 1309 (Fed. Cir. 2007). While not within the scope of the proposed regulations, two commenters urged that agencies be required to meet the ''reasonable cause'' standard specified in 5 U.S.C. 7513(b)(1) in all indefinite suspensions involving allegations of criminal activity.

One comment asserted that OPM was giving agencies license to suspend employees indefinitely, without pay, for virtually any serious misconduct. This comment focused on duration and control—that is, agencies would have the power to suspend employees indefinitely for a duration solely within the agency's control, unbounded by any external event, such as a criminal investigation resulting in a criminal charge or other disposition.

Focusing on the agencies' burden of proof, this comment also asserted that the proposed regulations did not make clear what an agency would have to show to a reviewing body to justify its action. That is, although OPM clarified that the correct standard is ''preponderance of the evidence'' rather than a universally applied and, in the commenter's view, more appropriate ''reasonable cause'' standard, it is unclear exactly what OPM contemplates that the agency would be required to prove by a preponderance of the evidence.

Several commenters also took issue with the enumeration of types of categories that would warrant an indefinite suspension. They described the list as vague and overbroad.

One commenter suggested additional language be added to sections 752.403(a), 752.404(b)(1), and 752.404(g) to state that regardless of whether the agency invokes the ''crime provision'' and shortens the notice period under 5 U.S.C. 7513(b)(1), action taken under this subpart must satisfy the requirement of 5 U.S.C. 7513(a) to prove that the suspension promotes the efficiency of the service.

Finally, one commenter suggested a change in the regulation at 5 CFR 752.404(b)(3)(ii) to require that when the provisions of 5 U.S.C. 7513(b)(1) are invoked to curtail the 30-day notice period, the employee will continue to receive pay and benefits for up to 30 days with no charge to his or her accrued leave.

After reviewing the comments, OPM has decided not to make any changes in the current regulations relating to indefinite suspensions.

The comments regarding standards and procedures for using indefinite suspensions persuade us that the issues raised are quite complex. These include

the amount of evidence needed to justify use of indefinite suspensions, issues relating to the absence of external events limiting the duration of investigations, and the types of misconduct that would justify the indefinite suspension action. Accordingly, we have determined that we should await further delineation of the law by MSPB and the Court of Appeals for the Federal Circuit before deciding whether to propose substantive regulations on this subject.

Miscellaneous Comments

One commenter expressed concern that the slow processing of security clearance appeals can leave employees on an indefinite suspension in limbo for months or years. The commenter recommended that OPM promulgate a new regulation to require that employees who have had their clearance suspended either be placed in another position not requiring a clearance or be provided back pay for the period of suspension if no such position exists. In addition, an agency proposed additional text be added to sections 752.404(c)(3), 752.404(f), 752.604(c)(3), and 752.604(f) to clarify that any request for medical information must be consistent with the Rehabilitation Act of 1973 [29 U.S.C. 791]. Since no change in the substantive content of the regulations in these areas was proposed, these suggestions are outside the scope of the current proposed regulation and therefore have not been considered.

Another agency recommended amendment of § 752.404(f) to clarify what they described as a new obligation to provide disability retirement information to employees with the requisite years of service for disability retirement even if the medical documentation is unrelated to the proposed adverse action. While the text in this area was reorganized for clarity, no change to the substantive content of the regulations in this area was proposed. Accordingly, this suggestion is outside the scope of the current proposed regulation and therefore has not been considered.

One commenter recommended changing the provisions governing appeals of adverse actions to the Merit Systems Protection Board (MSPB). They recommended that MSPB be authorized to issue summary judgment decisions without a hearing where the MSPB administrative judge finds there are no material facts in dispute or genuine issues of credibility. One agency recommended deletion of 5 CFR 752.401(c)(6), arguing that as written, it conflicts with case law, specifically *Van Wersch* v. *DHHS,* 197 F.3d 1144 (Fed. Cir. 1999), and the line of cases that followed. One union recommended that 5 CFR 752.201(b)(2) should be amended because it is inconsistent with 5 U.S.C. 7501. Since no change in the substantive content of the regulations in these areas was proposed, these suggestions are outside the scope of the current proposed regulation and therefore have not been considered.

Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed the final rule in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that these regulations will not have significant economic impact on a substantial number of small entities because they will affect Federal agencies, employees, and applicants only.

E.O. 13132

This regulation will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E.O. 12988—Civil Justice Reform

This regulation meets the applicable standard set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private section, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This action pertains to agency management, personnel and organization, and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 5 CFR Part 752

Administrative practice and procedure, Government employees.

U.S. Office of Personnel Management.

John Berry,

Director.

■ Accordingly, OPM is revising part 752 of title 5, Code of Federal Regulations, to read as follows:

PART 752—ADVERSE ACTIONS

Sec.

Authority: 5 U.S.C. 7504, 7514, and 7543.

Subpart A—[Reserved]

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

§ 752.201 Coverage.

(a) *Adverse actions covered.* This subpart covers suspension for 14 days or less.

(b) *Employees covered.* This subpart covers:

(1) An employee in the competitive service who has completed a probationary or trial period;

(2) An employee in the competitive service serving in an appointment which requires no probationary or trial period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter;

(4) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and still occupies that position;

(5) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(6) An employee of the Government Printing Office.

(c) *Exclusions.* This subpart does not apply to a suspension for 14 days or less:

(1) Of an administrative law judge under 5 U.S.C. 7521;

(2) Taken for national security reasons under 5 U.S.C. 7532;

(3) Taken under any other provision of law which excepts the action from subchapter I, chapter 75, of title 5, U.S. Code;

(4) Of a reemployed annuitant; or

(5) Of a National Guard Technician.

(d) *Definitions.* In this subpart—

Current continuous employment means a period of employment immediately preceding a suspension action without a break in Federal civilian employment of a workday.

Day means a calendar day.

Similar positions means positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work.

Suspension means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

§ 752.202 Standard for action.

(a) An agency may take action under this subpart for such cause as will promote the efficiency of the service as set forth in 5 U.S.C. 7503(a).

(b) An agency may not take a suspension against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.

§ 752.203 Procedures.

(a) *Statutory entitlements.* An employee under this subpart whose suspension is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7503(b).

(b) *Notice of proposed action.* The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.

(c) *Employee's answer.* The employee must be given a reasonable time, but not less than 24 hours, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

(d) *Representation.* An employee covered by this subpart is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(e) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official.

(2) The agency must specify in writing the reason(s) for the decision and advise the employee of any grievance rights under paragraph (f) of this section. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(f) *Grievances.* The employee may file a grievance through an agency administrative grievance system (if applicable) or, if the suspension falls within the coverage of an applicable negotiated grievance procedure, an employee in an exclusive bargaining unit may file a grievance only under that procedure. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, and the terms of any collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a suspension under this subpart through the negotiated grievance procedure.

(g) *Agency records.* The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon their request, the following documents:

(1) Notice of the proposed action;

(2) Employee's written reply, if any;

(3) Summary of the employee's oral reply, if any;

(4) Notice of decision; and

(5) Any order effecting the suspension, together with any supporting material.

Subpart C—[Reserved]

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

§ 752.401 Coverage.

(a) *Adverse actions covered.* This subpart applies to the following actions:

(1) Removals;

(2) Suspensions for more than 14 days, including indefinite suspensions;

(3) Reductions in grade;

(4) Reductions in pay; and

(5) Furloughs of 30 days or less.

(b) *Actions excluded.* This subpart does not apply to:

(1) An action imposed by the Merit Systems Protection Board under the authority of 5 U.S.C. 1215;

(2) The reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321(a)(2) if such a reduction is to the grade held immediately before becoming a supervisor or manager;

(3) A reduction-in-force action under 5 U.S.C. 3502;

(4) A reduction in grade or removal under 5 U.S.C. 4303;

(5) An action against an administrative law judge under 5 U.S.C. 7521;

(6) A suspension or removal under 5 U.S.C. 7532;

(7) Actions taken under any other provision of law which excepts the action from subchapter II of chapter 75 of title 5, United States Code;

(8) Action that entitles an employee to grade retention under part 536 of this chapter, and an action to terminate this entitlement;

(9) A voluntary action by the employee;

(10) Action taken or directed by the Office of Personnel Management under part 731 of this chapter;

(11) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(12) Action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent grade and pay, if the agency informed the employee that it was to be of limited duration;

(13) Cancellation of a promotion to a position not classified prior to the promotion;

(14) Placement of an employee serving on an intermittent or seasonal basis in a temporary nonduty, nonpay status in accordance with conditions

established at the time of appointment; or

(15) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108–411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments.

(c) *Employees covered.* This subpart covers:

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period;

(2) An employee in the competitive service who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(3) An employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission and who has completed 1 year of current continuous service in the same or similar positions;

(4) A Postal Service employee covered by Public Law 100–90 who has completed 1 year of current continuous service in the same or similar positions and who is either a supervisory or management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at section 105 of title, 5, United States Code, and who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter;

(7) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and who still occupies that position;

(8) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(9) An employee of the Government Printing Office.

(d) *Employees excluded.* This subpart does not apply to:

(1) An employee whose appointment is made by and with the advice and consent of the Senate;

(2) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by the President for a position that the President has excepted from the competitive service; the Office of Personnel Management for a position that the Office has excepted from the competitive service (Schedule C); or the President or the head of an agency for a position excepted from the competitive service by statute;

(3) A Presidential appointee;

(4) A reemployed annuitant;

(5) A technician in the National Guard described in section 8337(h)(1) of title 5, United States Code, who is employed under section 709(a) of title 32, United States Code;

(6) A Foreign Service member as described in section 103 of the Foreign Service Act of 1980;

(7) An employee of the Central Intelligence Agency or the Government Accountability Office;

(8) An employee of the Veterans Health Administration (Department of Veterans Affairs) in a position which has been excluded from the competitive service by or under a provision of title 38, United States Code, unless the employee was appointed to the position under section 7401(3) of title 38, United States Code;

(9) A nonpreference eligible employee with the U.S. Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, the National Security Agency, the Defense Intelligence Agency, or any other intelligence component of the Department of Defense (as defined in section 1614 of title 10, United States Code), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, United States Code;

(10) An employee described in section 5102(c)(11) of title 5, United States Code, who is an alien or noncitizen occupying a position outside the United States;

(11) A nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless he or she meets the requirements of paragraph (c)(5) of this section;

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code; and

(13) An employee in the competitive service serving a probationary or trial period, unless he or she meets the requirements of paragraph (c)(2) of this section.

§ 752.402 Definitions.

In this subpart—

Current continuous employment means a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.

Day means a calendar day.

Furlough means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

Grade means a level of classification under a position classification system.

Indefinite suspension means the placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action which may include the completion of any subsequent administrative action.

Pay means the rate of basic pay fixed by law or administrative action for the position held by the employee, that is, the rate of pay before any deductions and exclusive of additional pay of any kind.

Similar positions means positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work.

Suspension means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay for more than 14 days.

§ 752.403 Standard for action.

(a) An agency may take an adverse action, including a performance-based adverse action or an indefinite suspension, under this subpart only for such cause as will promote the efficiency of the service.

(b) An agency may not take an adverse action against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.

§ 752.404 Procedures.

(a) *Statutory entitlements.* An employee against whom action is

proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b).

(b) *Notice of proposed action.* (1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of proposed action must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(3) Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed will remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

(i) Assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or to Government property;

(ii) Allowing the employee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave;

(iii) Curtailing the notice period when the agency can invoke the provisions of paragraph (d)(1) of this section; or

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action.

(c) *Employee's answer.* (1) An employee may answer orally and in writing except as provided in paragraph (c)(2) of this section. The agency must give the employee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the employee is in an active duty status. The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days.

(2) The agency will designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides for such hearing in its regulations. Under 5 U.S.C. 7513(c), the agency may, in its regulations, provide a hearing in place of or in addition to the opportunity for written and oral answer.

(3) If the employee wishes the agency to consider any medical condition which may contribute to a conduct, performance, or leave problem, the employee must be given a reasonable time to furnish medical documentation (as defined in § 339.104 of this chapter) of the condition. Whenever possible, the employee will supply such documentation within the time limits allowed for an answer.

(d) *Exceptions.* (1) Section 7513(b) of title 5, U.S. Code, authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension, including indefinite suspension. This notice exception is commonly referred to as the ''crime provision.'' This provision may be invoked even in the absence of judicial action.

(2) The advance written notice and opportunity to answer are not required for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(e) *Representation.* Section 7513(b)(3) of title 5, U.S. Code, provides that an employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(f) *Agency review of medical information.* When medical information is supplied by the employee pursuant to paragraph (c)(3) of this section, the agency may, if authorized, require a medical examination under the criteria of § 339.301 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.302 of this chapter. If the employee has the requisite years of service under the Civil Service Retirement System or the Federal Employees' Retirement System, the agency must provide information concerning disability retirement. The agency must be aware of the affirmative obligations of the provisions of 29 CFR 1614.203, which require reasonable accommodation of a qualified individual with a disability.

(g) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under § 752.405 of this part. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(h) *Applications for disability retirement.* Section 831.1204(e) of this chapter provides that an employee's application for disability retirement need not delay any other appropriate personnel action. Section 831.1205 and § 844.202 of this chapter set forth the basis under which an agency must file an application for disability retirement on behalf of an employee.

§ 752.405 Appeal and grievance rights.

(a) *Appeal rights.* Under the provisions of 5 U.S.C. 7513(d), an employee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board.

(b) *Grievance rights.* As provided at 5 U.S.C. 7121(e)(1), if a matter covered by this subpart falls within the coverage of an applicable negotiated grievance procedure, an employee may elect to file a grievance under that procedure or appeal to the Merit Systems Protection Board under 5 U.S.C. 7701, but not both. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, and the terms of an applicable collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a matter under this subpart through the negotiated grievance procedure.

§ 752.406 Agency records.

The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon his or her request, the following documents:

(a) Notice of the proposed action;
(b) Employee's written reply, if any;
(c) Summary of the employee's oral reply, if any;
(d) Notice of decision; and
(e) Any order effecting the action, together with any supporting material.

Subpart E—[Reserved]

Subpart F—Regulatory Requirements for Taking Adverse Action Under the Senior Executive Service

§ 752.601 Coverage.

(a) *Adverse actions covered.* This subpart applies to suspensions for more than 14 days and removals from the civil service as set forth in 5 U.S.C. 7542.

(b) *Actions excluded.* (1) An agency may not take a suspension action of 14 days or less.

(2) This subpart does not apply to actions taken under 5 U.S.C. 1215, 3592, 3595, or 7532.

(c) *Employees covered.* This subpart covers the following appointees:

(1) A career appointee—

(i) Who has completed the probationary period in the Senior Executive Service;

(ii) Who is not required to serve a probationary period in the Senior Executive Service; or

(iii) Who was covered under 5 U.S.C. 7511 immediately before appointment to the Senior Executive Service.

(2) A limited term or limited emergency appointee—

(i) Who received the limited appointment without a break in service in the same agency as the one in which the employee held a career or career-conditional appointment (or an appointment of equivalent tenure as determined by the Office of Personnel Management) in a permanent civil service position outside the Senior Executive Service; and

(ii) Who was covered under 5 U.S.C. 7511 immediately before appointment to the Senior Executive Service.

(d) *Employees excluded.* This subpart does not cover an appointee who is serving as a reemployed annuitant.

§ 752.602 Definitions.

In this subpart—

Career appointee, limited term appointee, and *limited emergency appointee* have the meaning given in 5 U.S.C. 3132(a).

Day means calendar day.

Suspension has the meaning given in 5 U.S.C. 7501(2).

§ 752.603 Standard for action.

(a) An agency may take an adverse action under this subpart only for reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(b) An agency may not take an adverse action under this subpart on the basis of any reason prohibited by 5 U.S.C. 2302.

§ 752.604 Procedures.

(a) *Statutory entitlements.* An appointee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7543(b).

(b) *Notice of proposed action.* (1) An appointee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice.

(2) Under ordinary circumstances, an appointee whose removal has been proposed will remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the appointee's continued presence in the work place during the notice period may pose a threat to the appointee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

(i) Assigning the appointee to duties where he or she is no longer a threat to safety, the agency mission, or Government property;

(ii) Allowing the appointee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the appointee has absented himself or herself from the worksite without requesting leave;

(iii) Curtailing the notice period when the agency can invoke the provisions of paragraph (d) of this section; or

(iv) Placing the appointee in a paid, nonduty status for such time as is necessary to effect the action.

(c) *Appointee's answer.* (1) The appointee may answer orally and in writing except as provided in paragraph (c)(2) of this section. The agency must give the appointee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the appointee is in an active duty status. The agency may require the appointee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days.

(2) The agency will designate an official to hear the appointee's oral answer who has authority either to make or to recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides for such hearing in its regulations. Under 5 U.S.C. 7543(c), the agency may in its regulations provide a hearing in place of or in addition to the opportunity for written and oral answer.

(3) If the appointee wishes the agency to consider any medical condition that may have affected the basis for the adverse action, the appointee must be given reasonable time to furnish medical documentation (as defined in § 339.104 of this chapter) of the condition. Whenever possible, the appointee will supply such documentation within the time limits allowed for an answer.

(d) *Exception.* Section 7543(b)(1) of title 5, U.S. Code, authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the appointee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension. This notice exception is commonly referred to as the ''crime provision.'' This provision may be invoked even in the absence of judicial action.

(e) *Representation.* Section 7543(b)(3) of title 5, U.S. Code, provides that an appointee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an appointee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(f) *Agency review of medical information.* When medical information is supplied by the appointee pursuant to paragraph (c)(3) of this section, the agency may, if authorized, require a medical examination under the criteria of § 339.301 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.302 of this chapter. If the appointee has the requisite years of service under the Civil Service Retirement System or the Federal

Employees' Retirement System, the agency must provide information concerning disability retirement. The agency must be aware of the affirmative obligations of the provisions of 29 CFR 1614.203, which require reasonable accommodation of a qualified individual with a disability.

(g) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the appointee or the appointee's representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the appointee of any appeal rights under § 752.605 of this part. The agency must deliver the notice of decision to the appointee on or before the effective date of the action.

(h) *Applications for disability retirement.* Section 831.1204(e) of this chapter provides that an appointee's application for disability retirement need not delay any other appropriate personnel action. Section 831.1205 and § 844.202 of this chapter set forth the basis under which an agency must file an application for disability retirement on behalf of an appointee.

§ 752.605 Appeal rights.

(a) Under 5 U.S.C. 7543(d), a career appointee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board.

(b) A limited term or limited emergency appointee who is covered under § 752.601(c)(2) also may appeal an action taken under this subpart to the Merit Systems Protection Board.

§ 752.606 Agency records.

The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the appointee upon his or her request, the following documents:

(a) Notice of the proposed action;

(b) Appointee's written reply, if any;

(c) Summary of the appointee's oral reply, if any;

(d) Notice of decision; and

(e) Any order effecting the action, together with any supporting material.

[FR Doc. E9–28995 Filed 12–3–09; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 662

RIN 0578–AA44

Regional Equity

AGENCY: Natural Resources Conservation Service, United States Department of Agriculture.

ACTION: Final rule.

SUMMARY: The Natural Resources Conservation Service (NRCS) is issuing a final rule on the procedures for implementing the Regional Equity provision of section 1241(d) of the Food Security Act of 1985, 16 U.S.C. 3841(d). The Regional Equity provision ensures that each State receives a $15 million minimum annual aggregate level of conservation program funding. NRCS published an interim final rule for Regional Equity in the **Federal Register** on January 13, 2009, with request for public comment. This final rule responds to comments received on the January 13, 2009, interim final rule, and makes minor adjustments to the Regional Equity regulation at 7 CFR part 662 in response to these comments.

DATES: Effective December 4, 2009.

FOR FURTHER INFORMATION CONTACT: Geno Bulzomi, Acting Team Leader, Program Allocations and Management Support Team, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5208 South Building, Washington, DC 20250; telephone (202) 690–0547; e-mail: *PAMS@wdc.usda.gov,* Attention: Regional Equity.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, *etc.*) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and will not be reviewed by OMB under Executive Order 12866.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule because NRCS is not required by 5 U.S.C. 553, or any other provision of law, to publish a notice of final rulemaking with respect to the subject matter of this rule.

Civil Rights Assessment

NRCS has determined through a Civil Rights Impact Analysis that the issuance of this final rule discloses no disproportionately adverse impact for minorities, women, or persons with disabilities. The data presented indicates producers who are members of the historically underserved groups have participated in NRCS programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that NRCS programs, including Regional Equity, will continue to be administered in a non-discriminatory manner. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in the Department of Agriculture (USDA) programs. Regional Equity funding applies to all persons equally regardless of their race, color, national origin, gender, sex, or disability status. Therefore, the Regional Equity rule portends no adverse civil rights implications. Copies of the Civil Rights Impact Analysis may be obtained from Geno Bulzomi, Acting Team Leader, Program Allocations and Management Support Team, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5208 South Building, Washington, DC 20250.

Environmental Analysis

The Regional Equity final rule establishes procedures for implementing this provision at part 662 of this title and will not directly impact the environment. This rule falls within the categories of activities that have been determined not to have a significant individual or cumulative effect on the human environment and are excluded from the preparation of an environmental assessment or environmental impact statement as set forth in the USDA National Environmental Policy Act regulations in 7 CFR part 1b.3. Regional Equity is an administrative function that relates to the funding of programs and fund disbursements. These activities are categorically excluded based upon 7 CFR 1b.3(a)(1) and 7 CFR 1b.3(a)(2) of USDA regulations.

Paperwork Reduction Act

Section 2904 of the Food, Conservation, and Energy Act of 2008 (2008 Act) requires that implementation of programs authorized by Title II of the

2008 Act be made without regard to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this rule.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments or the private sector of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA requires NRCS to prepare a written statement, including a cost benefit assessment, for proposed and final rules with ''Federal mandates'' that may result in such expenditures for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates, as defined under Title II of UMRA, for State, local, and Tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988. The provisions of this rule are not retroactive. Furthermore, the provisions of this final rule preempt State and local laws to the extent such laws are inconsistent with the rule.

Executive Order 13132

NRCS has considered this final rule in accordance with Executive Order 13132, issued August 4, 1999. NRCS has determined that the rule conforms to the Federalism principles set out in this Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, NRCS concludes that this rule does not have Federalism implications.

Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal governments. USDA has assessed the impact of this final rule on Indian Tribal governments and has concluded that this final rule will not negatively affect communities of Indian Tribal governments. The rule will neither impose substantial direct compliance costs on Tribal governments, nor preempt Tribal law.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

Pursuant to section 304 of the Department of Agriculture Reorganization Act of 1994, Public Law 104–354, USDA classified this final rule as ''not major.''

Background

NRCS is issuing a final rule on the Regional Equity provision, implementing section 1241(d) of the Food Security Act of 1985, as amended, (16 U.S.C. 3841(d)) that requires minimum annual levels of conservation program funding to each State. Section 2703 of the 2008 Act amended the Regional Equity provision by: Increasing the minimum annual aggregate funding level from $12 million to $15 million; establishing new conservation programs that are subject to the Regional Equity provision (Agricultural Water Enhancement Program, Chesapeake Bay Watershed Initiative, Conservation Stewardship Program, and Voluntary Public Access and Habitat Incentive Program); and requiring consideration of the respective demand in each Regional Equity State.

On January 13, 2009, NRCS published an interim final rule setting forth how it intended to implement the Regional Equity provision. Under the Regional Equity regulation at 7 CFR part 662, NRCS identifies the States that will not receive through the normal program allocation process a minimum aggregate level of funding of $15 million, known as ''Regional Equity States,'' and also identifies programs that will contribute funds to meeting this threshold known as ''contribution programs.'' NRCS then establishes program-specific drawing accounts for each contribution program sufficient to bring all Regional Equity States to an allocation of $15 million. A Regional Equity State can request funds from the program-specific drawing accounts after the State has obligated at least 90 percent of its initial allocation for that program. The Chief, however, has the discretion to waive this requirement to meet the specific need of a particular program.

This process enables NRCS to monitor the use of drawing account funds and ensure that funds are used in the most effective and timely manner. NRCS used a similar funding allocation procedure in fiscal year (FY) 2008, when some Regional Equity States were unable to use all of their Regional Equity funding. By holding Regional Equity funds in program-specific drawing accounts, NRCS reallocated these funds earlier in the fiscal year than the statutory April 1 deadline and identified States that could obligate the funds toward high-priority needs. NRCS believes this approach positions the agency to ensure that program funds are directed to the highest-ranked applications.

Under the interim final rule, NRCS identified that it considers the respective demand in each Regional Equity State in each program by having State Conservationists in Regional Equity States cooperatively determine the funding opportunity for each State's program-specific drawing account. State Conservationists consult with their respective State Technical Committees in evaluating the demand in their State for funding from the drawing accounts. In evaluating the demand for Regional Equity funding opportunities, State Conservationists consider how applications address national program priorities, historic trends in program interest, and the State's priority natural resource concerns. This process enables additional funds to be allocated in a way that meets the natural resource conservation needs of each State's producers, meets the demand of each State's program needs, and ensures that States do not receive additional funding when there is insufficient demand.

Public Comments and Agency Response

NRCS published the Regional Equity interim final rule on January 13, 2009, and invited public comment on the rule as well as on any economic or environmental impacts that might result from implementation of the regulation. The deadline for comments was March 16, 2009. NRCS received 7 responses containing more than 20 comments.

After consideration of those comments, as described herein, NRCS is issuing this final rule to establish consistency and certainty in implementation procedures for the Regional Equity provision.

The Allocation Process

Comment. Although most respondents were supportive of the general approach and most of the specific implementation measures, one respondent objected to the process of giving initial threshold allocations based on a formula allocating shares across States. The respondent argued that time is lost by insisting on an initial allocation of funds to States that cannot

spend the full amount, and recommended that States able to use larger allocations should get access to the money well before the end of the fiscal year.

Response. Regional Equity for all States is a statutory requirement. However, NRCS is taking measures, as detailed above, to ensure that funds are available in a timely manner to other States when a Regional Equity State does not use its available allocation. By establishing program-specific drawing accounts for each covered program, NRCS is able to monitor the use of drawing account funds, determine early whether a Regional Equity State is able to use all its Regional Equity funding, and reallocate funds in a timely manner to other States with high-priority needs.

Comment. One respondent submitted two comments recommending that NRCS establish a single conservation drawing account rather than program-specific accounts, thus allowing each State Conservationist, with input from the State Technical Committee, to choose the mix of program funding for itself as well as to indicate early how much of a particular program allocation it would not use. The amount of program funding ''turned back'' would then be credited to the State's drawing account.

Response. Currently, NRCS receives a separate fund apportionment for each conservation program, which it tracks and reports separately. NRCS then allocates funding to the States for each program through a formula based upon natural resource and performance criteria. States work within the program-specific available funding. NRCS is working to simplify the apportionment process and allow for better management of the NRCS workforce.

Comment. Two respondents expressed explicit support for the allocation formula process identified above, but requested that the formulas include a monitoring and evaluation component to determine how well State projects or programs were meeting State and national priorities, goals, and objectives.

Response. This comment is not specific to the Regional Equity regulation, and thus no change is made in the Regional Equity final rule. The allocation formula is not a monitoring tool, but the formula includes performance factors including whether States are meeting national priorities.

Determination of Contribution Programs

Comment. NRCS received two responses regarding the discretion given to the Chief in § 662.2 of the interim final rule to determine which potential conservation programs will be considered ''contribution programs'' in any given year. The respondents recommended that the Chief's annual determination be made ''on the basis of the respective demand for each program in Regional Equity States.''

Response. Since NRCS uses an allocation formula based upon natural resource and performance criteria, Regional Equity allocation determinations based solely on the demand for each program would disproportionately reduce access by non-Regional Equity States to funding they earn on the basis of the allocation formula. Regional Equity States have the opportunity to work with other Regional Equity States for the funding that best addresses their needs, thus increasing their flexibility in accessing funds. In exercising discretion with respect to determining the contribution programs, the Chief is limited by which programs have sufficient available funding in any given year and the fact that some programs are restricted by legislative intent (e.g., specific geographic area or specific resource concern). Moreover, not all Regional Equity programs are administered by NRCS. For example, the Voluntary Access and Habitat Incentive Program is administered by the Farm Service Agency.

Comment. In determining ''respective demand,'' State Conservationists should rely on more than the three criteria detailed in the interim final rule: program applications and how they address national program priorities, historic trends in program interest, and State priority natural resource concerns (see § 662.4(c)(2)(i)). In particular, the respondents identified additional criteria they believe should be added, including: (1) The need in each State to address gaps in participation in specific programs by Federally recognized Indian Tribes and socially disadvantaged and historically underserved producers; and (2) the degree to which a State has implemented initiatives and demonstrated results with respect to such populations. The respondents recommended that these criteria be applied both in the determination of respective demand and in the exercise of the Chief's discretion in § 662.4(f) with respect to reallocation decisions.

Response. Regional Equity funds must be obligated in the same manner as normal allocations, and thus all policy and statutory requirements for ensuring equal access for historically underserved producers (limited resource farmers and ranchers, beginning farmers and ranchers, and socially disadvantaged producers) remain in effect. There is no need for additional criteria for Regional Equity funds, and thus no change is made in this rule.

Obligation Threshold

Comment. Two respondents proposed reducing the 90 percent obligation threshold in § 662.4(e) of the interim final rule to 75 percent and giving the Chief discretion to reduce further the obligation threshold. Under the interim final rule, once a Regional Equity State has obligated 90 percent of its original allocation, it may request access to its portion of the Regional Equity drawing account for that program. However, the funds are only available until April 1 of each fiscal year, after which they may be reallocated at the discretion of the Chief. The respondents argued that meeting this 90 percent threshold by April 1 will be difficult for all programs in years when the congressional budget process runs late, and will be difficult for some programs in any year because of the particular requirements that some programs must meet before they can obligate funds.

Response. The purpose of the high threshold requirement is for Regional Equity States to demonstrate their capacity to obligate their funding. However, NRCS agrees that for some programs, this may be a difficult level of obligation to attain in a timely manner because of a particular program's internal requirements. Therefore, NRCS amended the language in § 662.4(e) of this final rule to give the Chief the ability to waive the threshold requirement with respect to specific programs.

April 1 Deadline

Comment. The April 1 deadline elicited two kinds of comments: (1) A request that NRCS commit to reallocating funds in response to State requests within 60 days after April 1, and (2) a request for clarification that the Chief has discretion to extend the April 1 deadline in order to provide States with access to the drawing account even after that date.

Response. The Chief has the discretion to extend the April 1 deadline, as indicated in the regulation in § 662.4(e). The Chief may reallocate funds not obligated, but does not require such reallocation. NRCS recognizes that the Federal appropriations process can be unpredictable and may leave NRCS unable to provide initial allocations early in the fiscal year. Thus, NRCS cannot commit to a firm timeline for the reallocation of Regional Equity funding. The Chief has the discretion to extend

the April 1 date to accommodate such delays in the appropriation process or other circumstances that might make it difficult for States to meet the date. In FY 2009, the Chief extended the deadline to August 15 when a continuing resolution left NRCS uncertain about what the funding levels would be for various programs. No further rule change is required.

List of Subjects in 7 CFR Part 662

Administrative practice and procedure, Agriculture, and Soil conservation.

■ For the reasons stated in the preamble, NRCS revises part 662 in chapter VI of Title 7 of the CFR to read as follows:

PART 662—REGIONAL EQUITY

Sec.
662.1 General.
662.2 Definitions.
662.3 Applicability.
662.4 Regional Equity implementation procedure.

Authority: 16 U.S.C. 3841(d).

§ 662.1 General.

This part sets forth the procedures that NRCS will use to implement the Regional Equity provision of the Food Security Act of 1985, 16 U.S.C. 3841(d).

§ 662.2 Definitions.

The following definitions are applicable to this part:

Chief means the Chief of NRCS or the person delegated authority to act on behalf of the Chief.

Contribution programs means Regional Equity programs that contribute funding to Regional Equity States, as determined by the Chief each fiscal year, consistent with the limitations established in 16 U.S.C. 3841(d).

Drawing account means the aggregated amount of contribution program funds required to bring all States to the Regional Equity threshold.

Funding opportunity means the amount of funding needed to bring a State to the $15,000,000 Regional Equity threshold for the aggregate of Regional Equity programs.

Initial allocation means the amount of conservation program allocation funding provided to all States through a merit-based, natural resource focused process.

Obligated means a specific binding agreement, in writing, for the purpose authorized by law and executed while the funding is available.

Regional Equity programs mean conservation programs under Subtitle D (excluding the Conservation Reserve Program, Wetlands Reserve Program, and the Conservation Security Program) of the Food Security Act of 1985. These programs include: Conservation Stewardship Program, Farm and Ranch Lands Protection Program, Grassland Reserve Program, Environmental Quality Incentives Program, Conservation Innovation Grants, Agricultural Water Enhancement Program, Conservation of Private Grazing Land, Wildlife Habitat Incentive Program, Grassroots Source Water Protection Program, Great Lakes Basin Program, Chesapeake Bay Watershed Initiative, and the Voluntary Public Access and Habitat Incentive Program. Regional Equity programs will be aggregated to determine whether a State meets the $15,000,000 Regional Equity threshold. However, not all Regional Equity programs will be considered contribution programs.

Regional Equity provision means the statutory requirement to give priority funding before April 1 for approved applications for specific programs within States that have not received a $15,000,000 aggregate level of funding.

Regional Equity States means any State not meeting the Regional Equity threshold of $15,000,000 through the initial allocation for Regional Equity programs.

Regional Equity threshold means the $15,000,000 minimum aggregate amount of Regional Equity program funds.

Respective demand means the mix of contribution program funds that each State Conservationist in a Regional Equity State requests to fill that State's funding opportunity.

State means all 50 States, the District of Columbia, Commonwealth of Puerto Rico, Guam, Virgin Islands, American Samoa, Commonwealth of the Northern Mariana Islands, and the Freely Associated States.

State Conservationist means the NRCS employee authorized to implement Regional Equity programs and direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Islands Area.

§ 662.3 Applicability.

The regulation in this part sets forth the policies and procedures for the Regional Equity provision as administered by the NRCS. This regulation applies to the Regional Equity programs defined in this part. The Chief will implement the Regional Equity provision by identifying programs that contribute to the establishment of program-specific drawing accounts for priority funding in Regional Equity States.

§ 662.4 Regional Equity implementation procedure.

The following procedures will implement the Regional Equity provision:

(a) *Determine initial allocations.* NRCS will determine initial conservation program funding levels for each State through a merit-based, natural resource focused allocation process as determined by the Chief.

(b) *Determine the funding opportunity.* The combined initial allocation funding level for Regional Equity programs, by State, will be compared to the Regional Equity threshold to determine each Regional Equity State's funding opportunity.

(c) *Establish contribution program fund levels.* Subject to availability of funds, contribution program fund levels are determined by:

(1) Identifying which programs contribute funds, as determined by the Chief, consistent with the limitations established in 16 U.S.C. 3841(d); and

(2) Each State's respective demand.

(i) State Conservationists in Regional Equity States, in consultation with State Technical Committees, will evaluate and determine their respective program demands based on the following criteria:

(A) Program applications and how they address national program priorities;

(B) Historic trends in program interest; and

(C) State priority natural resource concerns.

(ii) The State Conservationist's identified respective demand will assist the Chief in determining the composition of contribution program funds within the established drawing account.

(d) *Establish the drawing account.* NRCS will establish a drawing account for each contribution program, as determined in paragraphs (c)(1) and (c)(2) of this section, and will give priority before April 1 of each fiscal year for such funds to be used to fund applications in Regional Equity States sufficient to bring each of the Regional Equity States to the Regional Equity threshold of $15,000,000.

(e) *Access the drawing account.* State Conservationists in Regional Equity States may request access to that State's assigned portion of the drawing account once that State has obligated at least 90 percent of its initial allocation for that same program. The Chief may waive the 90 percent threshold requirement for a specific program in response to specific program needs.

(f) *Re-allocation of funds.* The program-specific drawing accounts for

Regional Equity States will be available until April 1 of each fiscal year, after which date the remaining funds may be re-allocated at the discretion of the Chief.

Signed this 30th day of November, 2009, in Washington, DC.

Dave White,

Chief, Natural Resources Conservation Service.

[FR Doc. E9–29001 Filed 12–3–09; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1207

[Doc. No. AMS–FV–09–0024; FV–09–706FR]

Potato Research and Promotion Plan; Assessment Increase

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends the Potato Research and Promotion Plan (Plan) to increase the assessment rate on handlers and importers of potatoes from 2.5 cents to 3 cents per hundredweight. This increase is provided for under the Plan which is authorized by the Potato Research and Promotion Act (Act). The National Potato Promotion Board, which administers the Plan, recommended this action to sustain and expand their promotional, research, advertising and communications programs.

DATES: *Effective:* December 7, 2009.

FOR FURTHER INFORMATION CONTACT: Deborah Simmons, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Room 0632, Stop 0244, Washington, DC 20250–0244; telephone: (202) 720–9915; or fax: (202) 205–2800; or e-mail: *Deborah.simmons@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under the Potato Research and Promotion Plan [7 CFR part 1207]. The Plan is authorized under the Potato Research and Promotion Act [7 U.S.C. 2611–2627]. This rule increases the assessment rate on handlers and importers of potatoes from 2.5 cents to 3 cents per hundredweight.

Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act allows handlers and importers subject to the Plan to file a written petition with the Secretary of Agriculture (Secretary) if they believe that the Plan, any provision of the Plan, or any obligation imposed in connection with the Plan, is not in accordance with the law. In any petition, the person may request a modification of the Plan or an exemption from the Plan. The petitioner will have the opportunity for a hearing on the petition. Afterwards, an Administrative Law Judge (ALJ) will issue a decision. If the petitioner disagrees with the ALJ's ruling, the petitioner has 30 days to appeal to the Judicial Officer, who will issue a ruling on behalf of the Secretary. If the petitioner disagrees with the Secretary's ruling, the petitioner may file, within 20 days, an appeal in the U.S. District Court for the district where the petitioner resides or conducts business.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601 *et seq.*], the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such action in order that small businesses will not be unduly or disproportionately burdened.

The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms (handlers and importers) as those having annual receipts of no more than $7 million. According to the Board, there are approximately 1,600 potato growing operations, 1,143 handlers and 252 importers who are subject to the provisions of the Plan. According to the National Agricultural Statistics Service (NASS), data from the 2008 crop year shows that approximately 395 cwt. of potatoes were produced per acre. The 2008 grower price published by NASS was $9.46 per cwt. Thus the value of potato production per acre in 2008 averaged $3,736.70 (395 times $9.36 cwt). At that average price, a producer would have to farm over 201 acres to receive an annual income from potatoes of $750,000 ($750,000 divided by $3,736.70 per acre equals 201 acres). Thus, it can be concluded that most producers, handlers and importers would not be classified as small businesses under the criteria established by the SBA.

Producers of less than 5 acres of potatoes are exempt from this program. Potato and potato products used for nonhuman food purposes, other than seed, are exempt from assessment but are subject to the disposition of exempted potatoes provisions of section 1207.515 of the regulations.

Under the current Plan, potato handlers and importers are required to pay an assessment of 2.5 cents per hundredweight. Handlers may collect assessments from the producer or deduct assessments from proceeds paid to the producer on whose potatoes the assessments are made. No more than one assessment shall be made on any potatoes or potato products. Funds collected by the board shall be used for research, development, advertising or promotion of potatoes and potato products and such other expenses for the administration, maintenance and functioning of the Board as may be authorized by the Secretary. The assessment at the current 2.5 cents per hundredweight generates about $10 million in annual revenues. The 2.5 cents per hundredweight assessment rate was established in August 2006 when the Plan was amended. The Plan is administered by the Board under U.S. Department of Agriculture supervision.

According to the Board, additional revenue is required in order to sustain and expand the promotional, research, advertising and communications programs. The Board approved the assessment rate increase at its March 13, 2009, meeting. This increase is consistent with section 1207.342(a) of the Plan which states that funds to cover the Board's expenses shall be acquired by the levying of assessments upon handlers and importers as designated in regulations recommended by the Board and issued by the Secretary. Such assessments shall be levied at the rate fixed by the Secretary which shall not exceed one-half of one per centum of the immediate past ten calendar years United States average price received for potatoes by growers as reported by the Department of Agriculture. Currently, section 1207.510 of the Plan states that an assessment of 2.5 cents per hundredweight shall be levied on all potatoes produced within the 50 states of the United States and an assessment rate of 2.5 cents per hundredweight shall be levied on all tablestock potatoes imported into the United States for ultimate consumption by humans and all seed potatoes. An assessment rate of 2.5 cents per hundredweight shall be levied on the fresh weight equivalents of

imported frozen or processed potatoes for ultimate consumption by humans. Further, not more than one such assessment may be collected on any potatoes or potato products.

In March 2007, the Board conducted its most recent ''Evaluation of Grower-Funded Value-Added Activities by the United States Potato Board.'' This study was completed by Dr. Timothy Richards and Dr. Paul Patterson of the Morrison School of Management and Agribusiness at Arizona State University. The study presented an econometric evaluation of the demand impact of board marketing, public relations and research activities and a simulation model that estimates the return on grower investment in board programs. The primary objective of this research was to estimate the long-run return on grower's investment in each board activity, in both domestic and export marketing.

The U.S. potato market was volatile over the five year period (CY 2002–CY 2006). According to USDA data, the per capita consumption of potatoes, of all forms in the U.S., changed very little over this period. Grower prices, on the other hand, were strong in 2001, but fell through the 2004 marketing season. High prices may have been due to the activities of a newly formed potato industry cooperative comprising some 65% of the U.S. potato supply. In 2001 the Board adopted a new business model for increasing potato consumption, eschewing traditional generic advertising programs for retail partnerships, public relations, marketing research, product development and active export promotion programming. The objective of this study was to determine the return on investment to grower funds invested in board marketing activities. The relevant markets for U.S. potatoes are defined as the domestic retail market (frozen, refrigerated, chips, bagged fresh, bulk fresh and dehydrated potatoes), the domestic food service market (skins, chips, formed products, hash browns, mashed, frozen, French fries, and whole potatoes), and export marketing for fresh (table stock and chipping stock), frozen, dehydrated and seed potatoes.

Econometric models were used to estimate the demand impact of board activities. Five models were created for this purpose: Domestic Retail, Domestic Foodservice model, Domestic ''Best Practices'' model to estimate the effect of targeted category management programs, and two export marketing models: One for Fresh, Frozen and Dehydrated potatoes and another for Seed potatoes. All models are estimated with data made available from board records and include retail scanner data, food service supplier survey data and USDA export data.

The study found that U.S. potato growers have received a significantly positive return on their investment in USPB activities over the FY 2002–FY 2006 period covered by the analysis. The study found that each is highly effective in increasing potato demand, although the final return varies widely among them. On a per dollar of investment basis; the most likely estimate of the return to the Domestic Retail program is $4.4743 in long run grower profit, while the Foodservice program provides a return of $3.035 per dollar of investment. Considering the Best Practices program on its own, which is part of the Domestic Retail effort; category management investments provide incremental revenue of $1.018 per dollar of program cost. On the export side, Frozen Consumer program generate a return of $1.27, while Frozen Trade activities return $1.11 and $1.19, respectively, while Fresh Consumer and Trade activities yield $10.36 and $6.93 per dollar. In all cases, these Returns on Investments estimates are at least as high as growers could earn on investments elsewhere and, in many cases, several times greater.

The Board's Executive Committee collectively recognized the need to sustain the momentum of current board programs, which continue to ''Maximize Return on Grower Investment.'' According to the Board, the board's domestic and global market strategies to increase demand for U.S. Potatoes and Potato Products have been highly successful, but industry and economic conditions have eroded the board's ability to fund the future needs of all its programs. The Board's Executive Committee proposed the ½-cent increase in the assessment rate in order to maintain the value in all programs. Over the last three fiscal years, however, several trends have asserted downward pressure on the board programs continued ability to sustain the industry recognized high level of return. Acreage decreases, produced by right-sizing supply with demand, and competition for acres to produce other crops, has reduced revenues' to the board. Higher costs, driven by worldwide inflation have increased the expenses of implementing board programs. The weakened U.S. dollar, in relation to the exchange rates of foreign currencies, has reduced the Board's purchasing power in obtaining needed goods and services to operate international marketing programs in foreign markets.

Alternatives were also considered by the Board, which included cutting back funding of marketing programs, international programs, and the new ''Potatoes Goodness Unearthed'' campaign. All of the alternatives were rejected by the Board. The Board believes that programs should not be reduced at a time when it's absolutely critical that they continue providing them, that it's a reasonable cost for keeping programs going and that the Board needs to maintain adequate reserves to handle food safety issues and other projects. The Board feels the direction it is going is in line with the grower's vision and that the assessment fee is money well invested. The Board believes that in order to continue to fund these and new programs, an increase in the assessment rate by ½ cent per hundredweight is needed.

Using the USDA previous 10-year average potato prices formula in the Plan, the assessment rate can be increased to 3.08 cents per hundredweight. However, it was determined that the rate would be increased ½ cent from 2.5 cents to 3 cents per hundredweight and that ½ cent would be easy to understand, communicate and ultimately to put into a collection system and at a full year of collection will deliver enough revenue to maintain the current programs with modest expansion. The ½-cent increase falls within the allowed limits in the Plan.

Using the 10-year average market price and average yield values of potatoes in the U.S., the increase in assessment rate to 3 cents per hundredweight will result in an average cost to growers of $11.93 per acre, which represents less than one-half of one percent (0.445 percent) of potato revenue per acre. Calculated at the current market price for potatoes of $8.36 per cwt: At the 3 cents per cwt assessment the total assessment for growers would be 0.359 percent of gross revenue per acre.

All potatoes are assessed the same assessment rate into the program regardless of origin—either U.S. grown or imported as fresh potatoes or potato products. The same assessments for domestic production and imports will be unchanged by the rate increase.

In order to sustain and expand the promotional, research, and communication programs, the Board decided to propose an increase in the assessment rate of ½ cent per hundredweight for a total assessment rate of 3 cents per hundredweight on all domestic and imported potatoes and potato products.

This rule does not impose additional recordkeeping requirements on handlers or importers of potatoes. Producers of fewer than 5 acres of potatoes annually are exempt.

There are no Federal rules that duplicate, overlap, or conflict with this rule.

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements that are imposed by the Plan have been approved previously under OMB control number 0581–0093. This rule does not result in a change to the information collection and recordkeeping requirements previously approved.

Background

Under the Plan, which became effective March 9, 1972, the Board administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen potatoes competitive position and expand domestic and foreign markets for potatoes and potato products. This program is financed by assessments on handlers and importers of potatoes and potato products. The Plan specifies that handlers are responsible for collecting and submitting assessments to the Board, reporting their handling of potatoes, and maintaining records necessary to verify their reporting. Handlers may collect assessments from producers or deduct assessments from the proceeds paid to the producer on whose potatoes the assessments are made. Importers are responsible for payment of assessments to the Board on potatoes imported into the United States through the U.S. Customs Service and Border Protection.

Based on the most recent data available in March 2009 from USDA, the average price received for potatoes for the period 1999 to 2008 was $6.74 per hundredweight. One-half of 1 per centum of this average price would allow a maximum assessment rate of $0.0337 cents per hundredweight. If the board had elected to use $0.0337 cents per hundredweight in its fiscal year 2008, when 449.7 million hundredweight of potatoes were assessed, the Board would have realized assessment dollars of $15,155,963 (vs. $11,243,296 actual collected in FY 2008), an increase in assessment revenue of $3.9 million.

A proposed rule was published in the **Federal Register** on July 27, 2009 [74 FR 36952]. Copies of the rule were made available through the Internet by the Department and the Office of the Federal Register. That rule provided a sixty-day comment period which ended September 25, 2009. Four comments were received by the deadline.

This rule increases the assessment rate by ½ cent per hundredweight for handlers and importers. Currently, the assessment rate is 2.5 cents per hundredweight levied on potatoes handled within the 50 States of the United States and 2.5 cents per hundredweight on imports of potatoes and potato products. According to the Board, in order to sustain and expand the promotion, research, and communications programs at present levels, the Board contends that additional revenue is required. The ½ cent per hundredweight assessment rate increase is estimated to generate $1 to $1.5 million in new revenue, depending upon production levels.

Based on assessments collected for crop year 2008, about 87 percent of this production total was from domestic assessments, with the remainder from imports. The Board states that the assessment rate increase would enable it to expand media services, educational programs, research programs, and establish, maintain, and expand domestic and foreign markets for potatoes. Some of the additional revenue, the Board states, would be used to increase the reserve fund over a two-year period to provide for adequate cash flow. Based on the 2008 crop year production figures, the Board would have received $13,491.955 in total assessments at the 3 cents per hundredweight assessment rate on potatoes.

In addition, the Board, whose members represent all potato producing states as well as importers, voted to propose the assessment rate increase at its March 13, 2009 meeting which was open to the public like all other meetings. The vote to recommend the assessment increase was 68 in favor and 7 against of the Board members present at the meeting. Most of the dissenting votes concerned the impact the increase would have on small growers.

Summary of Comments

In response to the proposed rule, the Department received four comments regarding the proposed amendment to the Plan to increase the assessment rate on handlers and importers of potatoes from 2.5 cents to 3 cents per hundredweight. Three comments were received from current Board members who state that being on the Board gives them a unique perspective on how the Board is helping to increase the demand for potato and potato products in the domestic and international markets. One comment was received from a trade association that represents the potato industry. All four of the comments were in favor of the proposed amendment, citing the need for the increased assessment rate to fund programs that will continue to be successful and increase demand for potatoes and potato products in domestic and international markets.

The Department has considered all of the comments and is not making any changes to the proposed rule based on them.

Pursuant to 5 U.S.C. 553, it is also found that good cause exists for not postponing the effective date of this action until one day after publication in the **Federal Register** because (1) the Board's Finance Committee needs the new assessment rate by the beginning of the calendar year so that they may develop a timely budget recommendation; (2) the Board needs the additional assessments for sustaining ongoing projects and developing new projects to create demand for potatoes and potato products in foreign and domestic markets; and (3) all comments supported the proposed assessment increase.

List of Subjects in 7 CFR Part 1207

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Potatoes, Promotion, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, Part 1207, Chapter XI of Title 7 is amended as follows:

PART 1207—POTATO RESEARCH AND PROMOTION PLAN

■ 1. The authority citation for 7 CFR part 1207 continues to read as follows:

Authority: 7 U.S.C. 2611–2627 and 7 U.S.C. 7401.

■ 2. Section 1207.510 is amended by revising paragraphs (a)(1), (b)(1) and the Table in paragraph (b)(3) as follows:

§ 1207.510 Levy of assessments.

(a) * * * (1) An assessment rate of 3 cents per hundredweight shall be levied on all potatoes produced within the 50 states of the United States.

* * * * *

(b) * * * (1) An assessment rate of 3 cents per hundredweight shall be levied on all tablestock potatoes imported into the United States for ultimate consumption by humans and all seed potatoes imported into the United

States. An assessment rate of 3 cents per hundredweight shall be levied on the fresh weight equivalents of imported frozen or processed potatoes for ultimate consumption by humans. The importer of imported tablestock potatoes, potato products, or seed potatoes shall pay the assessment to the board through the U.S. Customs Service and Border Protection at the time of entry or withdrawal for consumption of such potatoes and potato products into the United States.

* * * * *

(3) * * *

Tablestock potatoes, frozen or processed potatoes, and seed potatoes	Assessment	
	Cents/cwt	Cents/kg
0701.10.0020	3.0	0.066
0701.10.0040	3.0	0.066
0701.90.1000	3.0	0.066
0701.90.5010	3.0	0.066
0701.90.5020	3.0	0.066
0701.90.5030	3.0	0.066
0701.90.5040	3.0	0.066
0710.10.0000	6.0	0.132
2004.10.4000	6.0	0.132
2004.10.8020	6.0	0.132
2004.10.8040	6.0	0.132
2005.20.0070	4.716	0.104
0712.90.3000	21.429	0.472
1105.10.0000	21.429	0.472
1105.20.0000	21.429	0.472
2005.20.0040	21.429	0.472
2005.20.0020	12.240	0.27
1108.13.0010	27.0	0.595

* * * * *

Dated: November 30, 2009.

Rayne Pegg,

Administrator.

[FR Doc. E9–28924 Filed 12–3–09; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Part 609

RIN 1901–AB27

Loan Guarantees for Projects That Employ Innovative Technologies

AGENCY: Office of the Chief Financial Officer, Department of Energy.

ACTION: Final rule.

SUMMARY: On August 7, 2009, the Department of Energy (DOE or the Department) published a Notice of Proposed Rulemaking and Opportunity for Comment (NOPR) to make certain changes to the existing regulations for the loan guarantee program authorized by Section 1703 of Title XVII of the Energy Policy Act of 2005 (Title XVII or the Act). Section 1703 of Title XVII authorizes the Secretary of Energy (Secretary) to make loan guarantees for projects that ''avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.'' Section 1703 of Title XVII also identifies ten categories of technologies and projects that are potentially eligible for loan guarantees. The two principal goals of section 1703 of Title XVII are to encourage commercial use in the United States of new or significantly improved energy-related technologies and to achieve substantial environmental benefits. DOE believes that commercial use of these technologies will help sustain and promote economic growth, produce a more stable and secure energy supply and economy for the United States, and improve the environment.

Through experience gained implementing the loan guarantee program authorized by section 1703 of Title XVII, and information received from industry indicating the wide variety of ownership and financing structures which participants would like to employ in implementing projects seeking loan guarantees, DOE believes it is appropriate to make certain changes to the existing regulations to provide flexibility in the determination of an appropriate collateral package to secure guaranteed loan obligations, facilitate collateral sharing and related intercreditor arrangements with other project lenders, and to provide a more workable interpretation of certain statutory provisions regarding DOE's treatment of collateral, consistent with the intent and purposes of Title XVII. Having considered all of the comments submitted to DOE in response to the NOPR, the Department today is issuing this final rule.

DATES: This rule is effective December 4, 2009.

FOR FURTHER INFORMATION CONTACT: David G. Frantz, Director, Loan Guarantee Program Office, 1000 Independence Avenue, SW., Washington, DC 20585–0121, e-mail: *lgprogram@hq.doe.gov;* or Susan S. Richardson, Chief Counsel for the Loan Guarantee Program, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585–0121, e-mail: *lgprogram@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

Today's final rule amends the regulations implementing the loan

guarantee program authorized by section 1703 of Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514) (referred to as Title XVII). Section 1703 of Title XVII authorizes the Secretary of Energy (Secretary), after consultation with the Secretary of the Treasury, to make loan guarantees for projects that ''(1) avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and (2) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.'' (42 U.S.C. 16513(a))

On August 7, 2009, the Department published a Notice of Proposed Rulemaking and Opportunity for Comment (NOPR, 74 FR 39569) to make certain changes to the regulations for the Title XVII loan guarantee program.

Section 1702 of Title XVII outlines general terms and conditions for loan guarantee agreements and directs the Secretary to include in loan guarantee agreements ''such detailed terms and conditions as the Secretary determines appropriate to (i) protect the interests of the United States in case of a default; and (ii) have available all the patents and technology necessary for any person selected, including the Secretary, to complete and operate the project. (42 U.S.C. 16512(g)(2)(c)). Further, section 1702(d) addresses certain threshold requirements that must be met before the guaranty is made; and section 1702(g) addresses the Secretary's rights in the case of default of the loan. Specifically, section 1702(d) of Title XVII states, under the heading ''Repayment'' and addressing ''Subordination,'' that ''[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing.'' Further, when addressing the situation of default, section 1702(g)(2) of Title XVII states, with respect to ''subrogation'' and ''superiority of rights,'' that ''[t]he rights of the Secretary, with respect to any property acquired pursuant to a guarantee or related agreements, shall be superior to the rights of any other person with respect to the property.''

On October 23, 2007, DOE issued a final rule implementing Title XVII. In that final rule, DOE interpreted the interplay between these two provisions of section 1702 such that both describe the rights the Secretary must secure as a condition of making a guarantee. This understanding is reflected in the text of the regulations which requires that the Secretary receive a first lien security interest in all project assets as an incident to making a guarantee. Moreover, this interpretation of the applicability of the superiority of rights provision as a required element of the Secretary's making a guarantee was embedded in the text of the rule and was made explicit in the preambles to the proposed and final rules implementing section 1703 of Title XVII.

The Department has critically reexamined the statute, particularly its text and structure, and now concludes, as described below, that the interpretation of the statute requiring receipt of a first lien on all project assets is not one that it was legally compelled to adopt, and was not correct. A first lien on all project assets is better understood as one element that the Secretary may require for a particular project, but is not compelled by the statute to require. This final rule reflects what the Department has concluded is the correct interpretation of section 1702.

First, it should be borne in mind that nowhere does section 1702 itself require that the Secretary receive a first lien on all project assets as a condition of his ability to make a loan guarantee. Instead the statute requires only that the Secretary's guaranteed obligation ''not be subordinate to other financing.'' In fact, section 1702 does not require that the lender or the Secretary receive any collateral as a statutory requirement for making a loan guarantee.

Next, the ''first lien on all project assets'' requirement contained in the regulations seems traceable only to the ''superiority of rights'' provision contained in section 1702(g)(2)(B). The structure and wording of the statute, however, is indicative that section 1702(g)'s provisions are designed to govern post-default rights of the Secretary, rather than to impose conditions that must be met at the time the Secretary determines to make a loan guarantee. So understood, the ''property acquired'' as to which the Secretary's rights ''shall be superior to the rights of any other person'' relates to property ''acquired'' by the Secretary pursuant to his right of subrogation to the rights of the lender in any collateral or security interest.

As a structural matter, it is notable that the ''superiority of rights'' provision appears within and under the heading ''subrogation'' contained in section 1702(g)(2). Consideration of the structure of the statute is aided by the various captions that introduce its various substantive provisions. In general, those captions—first ''repayment,'' then ''subordination,'' then ''defaults,'' ''payment by the Secretary,'' ''subrogation,'' and then ''superiority of rights,'' reinforce the structural understanding of the statute as keying its particular provisions to the sequence of stages that are foreseeable in the loan guarantee relationship. So perceived, the topic of ''superiority of rights'' would become germane only as a subset of the sequence that begins with a ''default'' and after ''payment by the Secretary.''

It is also notable that the ''superiority of rights'' provision does not contain terms such as ''lien'', ''security interest'', ''collateral'' or the like, which could lead one to conclude that the plain meaning of the provision is to require a first lien on all project assets. Instead, the provision uses the words ''any property acquired'' with ''acquired'' in the past tense, which would indicate that the provision is intended to apply to property that has actually been acquired rather than property that one may or is entitled to acquire (as in the granting of a lien or security interest in collateral), which further supports DOE's interpretation.

Moreover, in reviewing applications for projects seeking a loan guarantee under section 1703 of Title XVII, DOE became aware that its original reading of the statute was in tension with the financing structure of many commercial transactions in the energy sector. For example, the tenancy in common ownership structure proposed for the next generation of nuclear generating facilities, under which multiple entities own undivided interests in a single facility, does not lend itself to the unitary project ownership anticipated by the regulations. In fact, tenancy in common is the typical form of ownership of utility grade power plants that are jointly owned by public power agencies, cooperative power systems and investor-owned utilities. Approximately one-third of all currently operating nuclear power reactors, and approximately one-third of all planned nuclear power reactors for which applications are pending at the Nuclear Regulatory Commission are jointly owned through tenancies in common. As such, each owner holds an undivided interest in the physical project assets, and each owner typically finances its investment in the project separately. In this scenario, DOE would not be guaranteeing a direct loan to a project company, and may be guaranteeing the loan obligations of only some but not all of the project owners. As a result, it may not be commercially feasible to obtain a lien on all project assets. Moreover, in certain circumstances, both in large infrastructure projects and in smaller

projects, creditworthy sponsors may be willing to offer a corporate lending structure in which DOE would rely on the balance sheet of the sponsor. In such a case, the credit of the sponsor may be sufficient to support a more modest pledge of assets.

Additionally, in response to prior solicitations, DOE has received expressions of interest from Export Credit Agencies (ECAs) concerning their possible participation in eligible projects as co-lenders, co-guarantors or insurers of loans. ECAs are governmental, quasi-governmental, or private institutions supported by and acting on behalf of their host governments that facilitate financing for home country exporters doing business in other nations. In addition to ECAs, there is a variety of other potential sources of financing for power generation projects, including municipal bond financing. There also could be interest rate or commodity hedging agreements and, after completion, working capital facilities for project companies. The ECAs, and likely the other sources of financing, will expect to share, on a *pari passu* basis, in collateral pledged to secure the borrower's debt obligations.

Thus, the interpretation of the statute contained in the October 23, 2007, final rule effectively disqualifies from participation in Title XVII programs proposed energy production facilities that employ innovative technologies that are jointly owned through a tenants in common structure or where there are appropriate co-lenders or co-guarantors who require a *pari passu* structure. DOE does not believe that a statute intended to encourage commercial use in the United States of new or significantly improved energy-related technologies would be written in a way as to make ineligible such industry participants.

As stated and explained above, DOE has concluded that section 1702 of Title XVII does not mandate that DOE receive a first lien position on all projects assets. In light of this interpretation of section 1702 of Title XVII, DOE is issuing this final rule which amends the existing regulations. Specifically, to ensure that the loan guarantee program has the ability to respond to the kinds of structuring issues discussed above, this final rule deletes the requirement of a first priority lien on all project assets (and other pledged collateral) and leaves to the Secretary the determination of an appropriate collateral package, as well as intercreditor arrangements. Such a determination by the Secretary is contemplated by sections 1702(a) and 1702(g)(2)(C), and remains subject to the requirement of section 1702(d)(3) that the guaranteed obligation not be subordinate to other financing. The Department believes that having the flexibility to determine on a project-by-project basis the scope of the collateral package and whether *pari passu* lending is in the best interests of the United States, will enable the Department to reduce its exposure on individual projects, diversify its portfolio and maximize the benefits of the resources available for the loan guarantee program.

II. Public Comments on the NOPR and DOE's Responses

The NOPR provided for the submission of comments through September 8, 2009. DOE received from the public several requests to extend the comment period. In response to those requests for additional time to comment on the proposed rule, DOE extended the comment period by two weeks.

DOE received timely comments on the NOPR from 2,123 interested parties (excluding requests for the extension of the comment period). DOE carefully reviewed all comments timely received on the NOPR.

Many of the comments that were received address matters that are not related to the specific rule changes proposed in the NOPR and are therefore outside the scope of this rulemaking. While DOE reviewed all of those comments, DOE will not address in this final rule any comments that are not within the scope of this rulemaking.

DOE summarizes below public comments received on the NOPR that are within the scope of this rulemaking, and discusses the Department's responses to those comments. In three cases, as described below, the Department made adjustments to the rule text as set forth in the NOPR. In addition, the Department made technical adjustments to the rule text in this final rule to implement more effectively the rule change and also made editorial and other corrections to the rule text that are not discussed in this preamble.

A. Definition of Eligible Project

Public Comments: Section 609.2 of the regulations defines ''Eligible Project'' to mean ''a project located in the United States that employs a New or Significantly Improved Technology that is not a Commercial Technology, and that meets all applicable requirements of section 1703 of the Act (42 U.S.C. 16513), the applicable solicitation and this part.'' Several commenters expressed the view that this definition should be amended to clarify that an ''Eligible Project'' may include an undivided interest (*i.e.*, interest held as a tenant in common) in a project or facility. As mentioned in the preamble, tenancy in common is the typical form of ownership of utility grade power plants that are jointly owned by public power agencies, cooperative power systems and investor-owned utilities.

DOE Response: DOE notes that the term ''project'', which is used in the definition of ''Eligible Project'', is not defined in Title XVII. DOE believes that the term ''project'' should be given its plain meaning to include any ''planned undertaking'', which would include any project consisting of an undivided interest (*i.e.*, interest held as a tenant in common) in project assets or facilities. As such, DOE believes that it is unnecessary to amend the definition of ''Eligible Project'' to include any text referring to ''undivided interest'', ''tenancy in common'' or the like. However, DOE has adjusted the rule text in Sections 609.4(b) and 609.6(b)(5) of the regulations to clarify that applicants may submit project proposals with respect to their undivided ownership interests in project assets or facilities.

B. Definition of Intercreditor Agreement

Public Comments: Several commenters proposed technical changes to the definition of ''Intercreditor Agreement'' based on a concern that the definition may have been drafted too narrowly to accomplish one of the stated purposes of the rule change, which is to provide DOE with flexibility in the determination of appropriate collateral sharing and related intercreditor arrangements with other project lenders.

DOE Response: DOE has carefully reviewed these proposed technical changes and, based on these comments as well as DOE's further review, has made technical adjustments to the definition of ''Intercreditor Agreement''. DOE believes that the modified definition of ''Intercreditor Agreement'', as reflected in this final rule, provides the necessary flexibility to DOE while protecting the interests of the United States by requiring that any such agreement be ''in form and substance satisfactory to DOE''.

C. Shorter Amortization of Non-Guaranteed Obligations

Public Comments: Section 609.10(d)(6) of the regulations provides that ''[t]he non-guaranteed portion of any Guaranteed Obligation must be repaid on a pro-rata basis, and may not be repaid on a shorter amortization schedule than the guaranteed portion.'' Several commenters expressed concern that this provision may prevent certain

credit providers, including Export Credit Agencies (ECAs) and other financial institutions, from participating in financings of Eligible Projects if such institutions require repayment on a shorter amortization schedule than the DOE-guaranteed loan. As indicated in the preamble, there exists a variety of potential sources of financing for power generation projects, including, but not limited to, ECAs.

DOE Response: DOE has carefully reviewed this issue and recognizes that there may be a diversity of appropriate financing arrangements and circumstances, including but not limited to participation by ECAs and other financial institutions, for the types of projects potentially eligible for DOE loan guarantees. DOE also recognizes that increasing the number of financial institutions that can participate in financings of Eligible Projects may have the effect of diversifying project-related risks. Accordingly, DOE has made adjustments to the text of Section 609.10(d)(6) of the regulations to permit shorter or faster amortization schedules for project-related financing or other credit arrangements (other than the Guaranteed Obligation), if DOE determines that the resulting financing structure of the project (1) allocates to DOE a reasonably proportionate share of the default risk, in light of (i) DOE's share of the total project financing, (ii) risk allocation among the credit providers, and (iii) internal and external credit enhancements; and (2) is appropriate to assure reasonable prospect of repayment of the principal of and interest on the DOE Guaranteed Obligation and to protect the interests of the United States in the case of default.

D. Opposition to the Rule Change

Public Comments: DOE received comments from a number of commenters opposed to the development of nuclear energy in general. These commenters expressed concern that the rule change appears to be promulgated with only one interest in mind—that of the nuclear power industry—and are opposed to the rule change. These commenters also expressed concern that the rule change will add unnecessary risk, such as the risk that taxpayers' money will be lost by ''waiving'' DOE's first lien rights to collateral.

DOE received a joint comment from a number of environmental and civic organizations (collectively, the ''*Joint Comment*'') that made a number of assertions, including: (1) That the rule change violates or is inconsistent with Title XVII of the Act, (2) that DOE has failed to explain why DOE's interpretations and rationales in the preamble to the 2007 final rule with respect to the first lien issue are incorrect, (3) that the rule change does not provide DOE with a basis for establishing terms or conditions of loan guarantee agreements that provide ''a reasonable prospect of repayment of the principal and interest'' on a loan, (4) that the rule change unreasonably gives the Secretary unbridled discretion in establishing substitutions for the protection of a first lien, and (5) that by the rule change DOE will encourage risky investments and raise the potential for defaults.

DOE received a comment from a self-described ''budget watchdog'' group expressing concern that the removal of the first lien requirement will weaken protections for the taxpayers and will jeopardize the recovery of taxpayer-provided loan guarantee funds.

DOE received a comment from an environmental group that made a number of assertions, including (1) that the rule change conflicts with the statute, (2) that DOE's analysis is irrational and does not comport with the statute's plain language, (3) that there is insufficient evidence to support DOE's reasoning for the rule change, and (4) that the rule change will place taxpayer dollars at risk. In particular, the commenter asserted that the plain meaning of section 1702(d)(3) (which provides that ''the obligation shall be subject to the condition that the obligation is not subordinate to other financing'') is to require a first lien on collateral. This assertion is based on the reasoning that the word ''subordinate'' means ''inferior'' and therefore the meaning of the words ''not subordinate'' would be the antonym of ''subordinate'' or ''inferior'' which is ''superior''.

DOE Response: As explained in this preamble, DOE has concluded that section 1702 of Title XVII does not mandate that DOE receive a first lien position on all projects assets, and it is in light of this interpretation of section 1702 of Title XVII that DOE is issuing this final rule. DOE believes that the rule change, as reflected in this final rule, is correct as a matter of statutory interpretation and will facilitate the implementation of section 1703 of Title XVII.

It should be noted that under section 1703(b) of Title XVII, Congress expressly provided for ten categories of projects that are eligible for DOE loan guarantees, and one of those categories is ''advanced nuclear energy facilities.'' It should also be noted that the rule change, as reflected in this final rule, is not limited to any one particular energy sector or industry. DOE believes that this final rule will facilitate the financing of a variety of eligible projects, as authorized by Congress, across different energy sectors and industries.

With respect to the comments regarding risk, it should be noted that the rule change, as reflected in this final rule, does not mean that DOE ''waives'' its right to require first lien rights in collateral for any project. Rather, it correctly leaves to the Secretary the determination of an appropriate financing structure, including a collateral package, credit support and intercreditor arrangements, for individual projects. DOE believes that this flexibility is in the best interests of the United States, as it gives the Department the ability to participate in projects that contain diversified funding sources. DOE believes that instead of increasing risk, this approach will likely reduce DOE's risk—by reducing DOE's exposure (*i.e.*, the amount of the DOE-guaranteed loan) on individual projects that also receive financing from non DOE-guaranteed sources—and consequently should help DOE diversify its portfolio.

With respect to the Joint Comment, DOE responds as follows:

(1) DOE believes that its interpretation of the Act, as reflected in the rule change, is correct as a matter of statutory interpretation and is consistent with the provisions, intent and purposes of the Act, for the reasons set forth above;

(2) DOE believes that, in the preamble to the NOPR and above, it has adequately explained its reasoning behind the rule change, including why the interpretations and rationales provided in the preamble to the 2007 final rule were incorrect. Additionally, DOE believes that its straightforward interpretation of the Act, as expressed in this final rule, renders unnecessary the convoluted reasoning in the preamble to the 2007 final rule which concluded that while *pari passu* liens on project assets are prohibited by the statute, DOE may nevertheless agree to share the proceeds of collateral in a *pari passu* manner as long as DOE controls the disposition of all project assets. Under that strained reasoning, DOE may enter into intercreditor or other arrangements to share proceeds from the sale of project collateral with lenders or other holders of the non-guaranteed portion of the DOE-guaranteed loan facility, but without explanation as to why co-lenders or co-guarantors who provide separate credit facilities and do not participate in the DOE-guaranteed loan facility are excluded from making any

such intercreditor or other arrangements;

(3) DOE does not believe that the rule change will prevent or hinder DOE from requiring an appropriate financing structure, including collateral arrangements and credit support, on any individual project in order to make the determination that there is ''a reasonable prospect of repayment of the principal and interest'' on the related loan. This requirement with respect to each loan guarantee will continue to be in effect. As explained above, the rule change does not ''waive'' DOE's right to require first liens or otherwise require an appropriate collateral package and credit support for any project. It should also be noted that this final rule contains numerous criteria for the programmatic, technical and financial evaluation of loan guarantee applications;

(4) DOE notes that section 1702(g)(2)(C) of Title XVII provides that ''a guarantee agreement shall include such detailed terms and conditions as the Secretary determines appropriate to (i) protect the interests of the United States in the case of default''. Accordingly, the Act gives the Secretary the discretion in determining what is ''appropriate'' with respect to the ''detailed terms and conditions'' of a loan guarantee agreement in the case of default. As explained above, the rule change correctly provides the Secretary with the flexibility to determine appropriate terms and conditions, including collateral, credit support and intercreditor terms, for individual projects; and

(5) DOE does not believe that the rule change itself will result in increased risk-taking or potential for defaults but rather, as explained above, the rule change will likely enhance the ability of DOE to reduce its risks.

With respect to the comments from the ''budget watchdog'' group, the rule change, as explained above, does not ''waive'' DOE's right to require first liens or otherwise to require an appropriate collateral package and credit support on any project. DOE will continue to be required to determine that there is ''a reasonable prospect of repayment of the principal and interest'' for each DOE-guaranteed loan. DOE will also continue to require such terms and conditions for guarantee agreements as DOE determines appropriate to protect the interests of the United States in the case of default.

With respect to the comment from the environmental group regarding the plain meaning of section 1702(d)(3), DOE notes that the plain meaning of ''not X'' does not necessarily mean the antonym or opposite of ''X''. For example, the phrase ''not less than'' does not simply mean ''greater than'' but should more properly be understood to mean ''equal to or greater than.'' DOE believes that a *pari passu* (a Latin term meaning ''with equal step'') obligation is not a subordinate or inferior obligation.

With respect to the other assertions by the environmental group, DOE reiterates its responses above and believes that they are adequately responsive to those assertions.

III. Regulatory Review

A. Executive Order 12866

Today's final rule has been determined to be a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs at Office of Management and Budget (OMB).

B. National Environmental Policy Act of 1969

Through the issuance of this final rule, DOE is making no decision relative to the approval of a loan guarantee for a particular proposed project. DOE has, therefore, determined that publication of this final rule is covered under the Categorical Exclusion found at paragraph A.6 of Appendix A to Subpart D, 10 CFR part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required at this time. However, appropriate NEPA project review will be conducted prior to execution of a Loan Guarantee Agreement.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://www.gc.doe.gov*.

DOE is not obliged to prepare a regulatory flexibility analysis for this rulemaking because there is no requirement to publish a general notice of proposed rulemaking for rules related to loans under the Administrative Procedure Act (5 U.S.C. 553(a)(2)).

D. Paperwork Reduction Act

This final rule involves a collection of information previously approved by OMB under Control Number [1910–5134].

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Act) (2 U.S.C. 1531 *et seq.*) requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in an agency rule that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials of State, Tribal, or local governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments.

The term ''Federal mandate'' is defined in the Act to mean a Federal intergovernmental mandate or a Federal private sector mandate (2 U.S.C. 658(6)). Although the rule will impose certain requirements on non-Federal governmental and private sector applicants for loan guarantees, the Act's definitions of the terms ''Federal intergovernmental mandate'' and ''Federal private sector mandate'' exclude, among other things, any provision in legislation, statute, or regulation that is a condition of Federal assistance or a duty arising from participation in a voluntary program (2 U.S.C. 658(5) and (7), respectively). Today's final rule establishes requirements that persons voluntarily seeking loan guarantees for projects that would use certain new and improved energy technologies must satisfy as a condition of a Federal loan guarantee. Thus, this final rule falls under the exceptions in the definitions of ''Federal intergovernmental mandate'' and ''Federal private sector mandate'' for requirements that are a condition of

Federal assistance or a duty arising from participation in a voluntary program. The Act does not apply to this rulemaking.

F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. This final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that this rule is a ''major rule'' as defined by 5 U.S.C. 804(2).

L. Approval by the Office of the Secretary of Energy

The Secretary of Energy has approved the issuance of this final rule.

List of Subjects in 10 CFR Part 609

Administrative practice and procedure, Energy, Loan programs, and Reporting and recordkeeping requirements.

Issued in Washington, DC, on November 30, 2009.

Steve Isakowitz,

Chief Financial Officer.

■ For the reasons stated in the preamble, chapter II of title 10 of the Code of Federal Regulations is amended by revising part 609 to read as follows:

PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES

Sec.

Authority: 42 U.S.C. 7254, 16511–16514.

§ 609.1 Purpose and scope.

(a) This part sets forth the policies and procedures that DOE uses for receiving, evaluating, and, after consultation with the Department of the Treasury, approving applications for

loan guarantees to support Eligible Projects under Section 1703 of Title XVII of the Energy Policy Act of 2005, as amended.

(b) Except as set forth in paragraph (c) of this section, this part applies to all Pre-Applications, Applications, Conditional Commitments and Loan Guarantee Agreements to support Eligible Projects under Section 1703 of Title XVII of the Energy Policy Act of 2005, as amended.

(c) Sections 609.3, 609.4 and 609.5 of this part shall not apply to any Pre-Applications, Applications, Conditional Commitments or Loan Guarantee Agreements submitted, or entered into, as applicable, on or before December 31, 2007; provided, that DOE accepted the Pre-Application and invited an Application pursuant to such Pre-Application.

(d) Part 1024 of chapter X of title 10 of the Code of Federal Regulations shall not apply to actions taken under this part.

§ 609.2 Definitions.

Act means Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514), as amended.

Administrative Cost of Issuing a Loan Guarantee means the total of all administrative expenses that DOE incurs during:

(1) The evaluation of a Pre-Application, if a Pre-Application is requested in a solicitation, and an Application for a loan guarantee;

(2) The offering of a Term Sheet, executing the Conditional Commitment, negotiation, and closing of a Loan Guarantee Agreement; and

(3) The servicing and monitoring of a Loan Guarantee Agreement, including during the construction, startup, commissioning, shakedown, and operational phases of an Eligible Project.

Applicant means any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other business entity or governmental non-Federal entity that has submitted an Application to DOE and has the authority to enter into a Loan Guarantee Agreement with DOE under the Act.

Application means a comprehensive written submission in response to a solicitation or a written invitation from DOE to apply for a loan guarantee pursuant to § 609.6 of this part.

Borrower means any Applicant who enters into a Loan Guarantee Agreement with DOE and issues Guaranteed Obligations.

Commercial Technology means a technology in general use in the commercial marketplace in the United States at the time the Term Sheet is issued by DOE. A technology is in general use if it has been installed in and is being used in three or more commercial projects in the United States in the same general application as in the proposed project, and has been in operation in each such commercial project for a period of at least five years. The five-year period shall be measured, for each project, starting on the in service date of the project or facility employing that particular technology. For purposes of this section, commercial projects include projects that have been the recipients of a loan guarantee from DOE under this part.

Conditional Commitment means a Term Sheet offered by DOE and accepted by the Applicant, with the understanding of the parties that if the Applicant thereafter satisfies all specified and precedent funding obligations and all other contractual, statutory and regulatory requirements, or other requirements, DOE and the Applicant will execute a Loan Guarantee Agreement: Provided that the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement; and Provided further that the Secretary may not delegate this authority to terminate a Conditional Commitment.

Contracting Officer means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer and/or terminate DOE Loan Guarantee Agreements and related contracts on behalf of DOE.

Credit Subsidy Cost has the same meaning as ''cost of a loan guarantee'' in section 502(5)(C) of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a(5)(C)), which is the net present value, at the time the Loan Guarantee Agreement is executed, of the following estimated cash flows, discounted to the point of disbursement:

(1) Payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments; less

(2) Payments to the Government including origination and other fees, penalties, and recoveries; including the effects of changes in loan or debt terms resulting from the exercise by the Borrower, Eligible Lender or other Holder of an option included in the Loan Guarantee Agreement.

DOE means the United States Department of Energy.

Eligible lender means:

(1) Any person or legal entity formed for the purpose of, or engaged in the business of, lending money, including, but not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, investment banks, institutional investors, venture capital investment companies, trusts, or other entities designated as trustees or agents acting on behalf of bondholders or other lenders; and

(2) Any person or legal entity that meets the requirements of § 609.11 of this part, as determined by DOE; or

(3) The Federal Financing Bank.

Eligible project means a project located in the United States that employs a New or Significantly Improved Technology that is not a Commercial Technology, and that meets all applicable requirements of section 1703 of the Act (42 U.S.C. 16513), the applicable solicitation and this part.

Equity means cash contributed by the Borrowers and other principals. Equity does not include proceeds from the non-guaranteed portion of Title XVII loans, proceeds from any other non-guaranteed loans, or the value of any form of government assistance or support.

Federal Financing Bank means an instrumentality of the United States government created by the Federal Financing Bank Act of 1973 (12 U.S.C. 2281 *et seq*). The Bank is under the general supervision of the Secretary of the Treasury.

Guaranteed Obligation means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act.

Holder means any person or legal entity that owns a Guaranteed Obligation or has lawfully succeeded in due course to all or part of the rights, title, and interest in a Guaranteed Obligation, including any nominee or trustee empowered to act for the Holder or Holders.

Intercreditor Agreement means any agreement or instrument among DOE and one or more other persons providing financing or other credit arrangements or that otherwise provides for rights of DOE, in each case, in form and substance satisfactory to DOE and entered into or accepted by DOE in connection with a DOE loan guarantee upon a determination by DOE that such agreement or instrument is reasonable and necessary to protect the interests of the United States, and addressing such matters as collateral sharing, priorities (subject always to Section 1702(d)(3) of Title XVII) and voting rights among creditors and other intercreditor arrangements, as such agreement or instrument may be amended or

modified from time to time with the consent of DOE.

Loan Agreement means a written agreement between a Borrower and an Eligible Lender or other Holder containing the terms and conditions under which the Eligible Lender or other Holder will make loans to the Borrower to start and complete an Eligible Project.

Loan Guarantee Agreement means a written agreement that, when entered into by DOE and a Borrower, an Eligible Lender or other Holder, pursuant to the Act, establishes the obligation of DOE to guarantee the payment of all or a portion of the principal and interest on specified Guaranteed Obligations of a Borrower to Eligible Lenders or other Holders subject to the terms and conditions specified in the Loan Guarantee Agreement.

New or Significantly Improved Technology means a technology concerned with the production, consumption or transportation of energy and that is not a Commercial Technology, and that has either:

(1) Only recently been developed, discovered or learned; or

(2) Involves or constitutes one or more meaningful and important improvements in productivity or value, in comparison to Commercial Technologies in use in the United States at the time the Term Sheet is issued.

OMB means the Office of Management and Budget in the Executive Office of the President.

Pre-Application means a written submission in response to a DOE solicitation that broadly describes the project proposal, including the proposed role of a DOE loan guarantee in the project, and the eligibility of the project to receive a loan guarantee under the applicable solicitation, the Act and this part.

Project costs means those costs, including escalation and contingencies, that are to be expended or accrued by Borrower and are necessary, reasonable, customary and directly related to the design, engineering, financing, construction, startup, commissioning and shakedown of an Eligible Project, as specified in § 609.12 of this part. Project costs do not include costs for the items set forth in § 609.12(c) of this part.

Project Sponsor means any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company or other business entity that assumes substantial responsibility for the development, financing, and structuring of a project eligible for a loan guarantee and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed Eligible Project, or the Applicant.

Secretary means the Secretary of Energy or a duly authorized designee or successor in interest.

Term Sheet means an offering document issued by DOE that specifies the detailed terms and conditions under which DOE may enter into a Conditional Commitment with the Applicant. A Term Sheet imposes no obligation on the Secretary to enter into a Conditional Commitment.

United States means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa or any territory or possession of the United States of America.

§ 609.3 Solicitations.

(a) DOE may issue solicitations to invite the submission of Pre-Applications or Applications for loan guarantees for Eligible Projects. DOE must issue a solicitation before proceeding with other steps in the loan guarantee process including issuance of a loan guarantee. A Project Sponsor or Applicant may only submit one Pre-Application or Application for one project using a particular technology. A Project Sponsor or Applicant, in other words, may not submit a Pre-Application or Application for multiple projects using the same technology.

(b) Each solicitation must include, at a minimum, the following information:

(1) The dollar amount of loan guarantee authority potentially being made available by DOE in that solicitation;

(2) The place and time for response submission;

(3) The name and address of the DOE representative whom a potential Project Sponsor may contact to receive further information and a copy of the solicitation;

(4) The form, format, and page limits applicable to the response submission;

(5) The amount of the application fee (First Fee), if any, that will be required;

(6) The programmatic, technical, financial and other factors the Secretary will use to evaluate response submissions, including the loan guarantee percentage requested by the Applicant and the relative weightings that DOE will use when evaluating those factors; and

(7) Such other information as DOE may deem appropriate.

§ 609.4 Submission of Pre-Applications.

In response to a solicitation requesting the submission of Pre-Applications, either Project Sponsors or Applicants may submit Pre-Applications to DOE. Pre-Applications must meet all requirements specified in the solicitation and this part. At a minimum, each Pre-Application must contain all of the following:

(a) A cover page signed by an individual with full authority to bind the Project Sponsor or Applicant that attests to the accuracy of the information in the Pre-Application, and that binds the Project Sponsor(s) or Applicant to the commitments made in the Pre-Application. In addition, the information requested in paragraphs (b) and (c) of this section should be submitted in a volume one and the information requested in paragraphs (d) through (h) of this section should be submitted in a volume two, to expedite the DOE review process.

(b) An executive summary briefly encapsulating the key project features and attributes of the proposed project (for clarity, with respect to any project in which project assets or facilities are jointly owned by the Applicant and one or more other persons, each of whom owns an undivided ownership interest in such project assets or facilities, the Applicant may submit a project proposal with respect to its undivided ownership interest in such project assets or facilities);

(c) A business plan which includes an overview of the proposed project, including:

(1) A description of the Project Sponsor, including all entities involved, and its experience in project investment, development, construction, operation and maintenance;

(2) A description of the new or significantly improved technology to be employed in the project, including:

(i) A report detailing its successes and failures during the pilot and demonstration phases;

(ii) The technology's commercial applications;

(iii) The significance of the technology to energy use or emission control;

(iv) How and why the technology is ''new'' or ''significantly improved'' compared to technology already in general use in the commercial marketplace in the United States;

(v) Why the technology to be employed in the project is not in ''general use;''

(vi) The owners or controllers of the intellectual property incorporated in and utilized by such technologies; and

(vii) The manufacturer(s) and licensee(s), if any, authorized to make the technology available in the United States, the potential for replication of

commercial use of the technology in the United States, and whether and how the technology is or will be made available in the United States for further commercial use;

(3) The estimated amount, in reasonable detail, of the total Project Costs;

(4) The timeframe required for construction and commissioning of the project;

(5) A description of any primary off-take or other revenue-generating agreements that will provide the primary sources of revenues for the project, including repayment of the debt obligations for which a guarantee is sought.

(6) An overview of how the project complies with the eligibility requirements in section 1703 of the Act (42 U.S.C. 16513);

(7) An outline of the potential environmental impacts of the project and how these impacts will be mitigated;

(8) A description of the anticipated air pollution and/or anthropogenic greenhouse gas reduction benefits and how these benefits will be measured and validated; and

(9) A list of all of the requirements contained in this part and the solicitation and where in the Pre-Application these requirements are addressed;

(d) A financing plan overview describing:

(1) The amount of equity to be invested and the sources of such equity;

(2) The amount of the total debt obligations to be incurred and the funding sources of all such debt if available;

(3) The amount of the Guaranteed Obligation as a percentage of total project debt; and as a percentage of total project cost; and

(4) A financial model detailing the investments in and the cash flows generated and anticipated from the project over the project's expected life-cycle, including a complete explanation of the facts, assumptions, and methodologies in the financial model;

(e) An explanation of what estimated impact the loan guarantee will have on the interest rate, debt term, and overall financial structure of the project;

(f) Where the Federal Financing Bank is not the lender, a copy of a letter from an Eligible Lender or other Holder(s) expressing its commitment to provide, or interest in providing, the required debt financing necessary to construct and fully commission the project;

(g) A copy of the equity commitment letter(s) from each of the Project Sponsors and a description of the sources for such equity; and

(h) A commitment to pay the Application fee (First Fee), if invited to submit an Application.

§ 609.5 Evaluation of Pre-Applications.

(a) Where Pre-Applications are requested in a solicitation, DOE will conduct an initial review of the Pre-Application to determine whether:

(1) The proposal is for an Eligible Project;

(2) The submission contains the information required by § 609.4 of this part; and

(3) The submission meets all other requirements of the applicable solicitation.

(b) If a Pre-Application fails to meet the requirements of paragraph (a) of this section, DOE may deem it non-responsive and eliminate it from further review.

(c) If DOE deems a Pre-Application responsive, DOE will evaluate:

(1) The commercial viability of the proposed project;

(2) The technology to be employed in the project;

(3) The relevant experience of the principal(s); and

(4) The financial capability of the Project Sponsor (including personal and/or business credit information of the principal(s)).

(d) After the evaluation described in subsection (c) of this section, DOE will determine if there is sufficient information in the Pre-Application to assess the technical and commercial viability of the proposed project and/or the financial capability of the Project Sponsor and to assess other aspects of the Pre-Application. DOE may ask for additional information from the Project Sponsor during the review process and may request one or more meetings with the Project Sponsor.

(e) After reviewing a Pre-Application and other information acquired under paragraph (c) of this section, DOE may provide a written response to the Project Sponsor or Applicant either inviting the Applicant to submit an Application for a loan guarantee and specifying the amount of the Application filing fee (First Fee) or advising the Project Sponsor that the project proposal will not receive further consideration. Neither the Pre-Application nor any written or other feedback that DOE may provide in response to the Pre-Application eliminates the requirement for an Application.

(f) No response by DOE to, or communication by DOE with, a Project Sponsor, or an Applicant submitting a Pre-Application or subsequent Application shall impose any obligation on DOE to enter into a Loan Guarantee Agreement.

§ 609.6 Submission of Applications.

(a) In response to a solicitation or written invitation to submit an Application, an Applicant submitting an Application must meet all requirements and provide all information specified in the solicitation and/or invitation and this part.

(b) An Application must include, at a minimum, the following information and materials:

(1) A completed Application form signed by an individual with full authority to bind the Applicant and the Project Sponsors;

(2) Payment of the Application filing fee (First Fee) for the Pre-Application, if any, and Application phase;

(3) A detailed description of all material amendments, modifications, and additions made to the information and documentation provided in the Pre-Application, if a Pre-Application was requested in the solicitation, including any changes in the proposed project's financing structure or other terms;

(4) A description of how and to what measurable extent the project avoids, reduces, or sequesters air pollutants and/or anthropogenic emissions of greenhouse gases, including how to measure and verify those benefits;

(5) A description of the nature and scope of the proposed project, including:

(i) Key milestones;

(ii) Location of the project;

(iii) Identification and commercial feasibility of the new or significantly improved technology(ies) to be employed in the project;

(iv) How the Applicant intends to employ such technology(ies) in the project; and

(v) How the Applicant intends to assure, to the extent possible, the further commercial availability of the technology(ies) in the United States;

(vi) For clarity, with respect to any project in which project assets or facilities are jointly owned by the Applicant and one or more other persons, each of whom owns an undivided ownership interest in such project assets or facilities, the Applicant may submit a project proposal with respect to its undivided ownership interest in such project assets or facilities.

(6) A detailed explanation of how the proposed project qualifies as an Eligible Project;

(7) A detailed estimate of the total Project Costs together with a description of the methodology and assumptions used;

(8) A detailed description of the engineering and design contractor(s), construction contractor(s), equipment supplier(s), and construction schedules for the project, including major activity and cost milestones as well as the performance guarantees, performance bonds, liquidated damages provisions, and equipment warranties to be provided;

(9) A detailed description of the operations and maintenance provider(s), the plant operating plan, estimated staffing requirements, parts inventory, major maintenance schedule, estimated annual downtime, and performance guarantees and related liquidated damage provisions, if any;

(10) A description of the management plan of operations to be employed in carrying out the project, and information concerning the management experience of each officer or key person associated with the project;

(11) A detailed description of the project decommissioning, deconstruction, and disposal plan, and the anticipated costs associated therewith;

(12) An analysis of the market for any product to be produced by the project, including relevant economics justifying the analysis, and copies of any contractual agreements for the sale of these products or assurance of the revenues to be generated from sale of these products;

(13) A detailed description of the overall financial plan for the proposed project, including all sources and uses of funding, equity and debt, and the liability of parties associated with the project over the term of the Loan Guarantee Agreement;

(14) A copy of all material agreements, whether entered into or proposed, relevant to the investment, design, engineering, financing, construction, startup commissioning, shakedown, operations and maintenance of the project;

(15) A copy of the financial closing checklist for the equity and debt to the extent available;

(16) Applicant's business plan on which the project is based and Applicant's financial model presenting project *pro forma* statements for the proposed term of the Guaranteed Obligations including income statements, balance sheets, and cash flows. All such information and data must include assumptions made in their preparation and the range of revenue, operating cost, and credit assumptions considered;

(17) Financial statements for the past three years, or less if the Applicant has been in operation less than three years, that have been audited by an independent certified public accountant, including all associated notes, as well as interim financial statements and notes for the current fiscal year, of Applicant and parties providing Applicant's financial backing, together with business and financial interests of controlling or commonly controlled organizations or persons, including parent, subsidiary and other affiliated corporations or partners of the Applicant;

(18) A copy of all legal opinions, and other material reports, analyses, and reviews related to the project;

(19) An independent engineering report prepared by an engineer with experience in the industry and familiarity with similar projects. The report should address: the project's siting and permitting, engineering and design, contractual requirements, environmental compliance, testing and commissioning and operations and maintenance;

(20) Credit history of the Applicant and, if appropriate, any party who owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the project or the Applicant;

(21) A preliminary credit assessment for the project without a loan guarantee from a nationally recognized rating agency for projects where the estimated total Project Costs exceed $25 million. For projects where the total estimated Project Costs are $25 million or less and where conditions justify, in the sole discretion of the Secretary, DOE may require such an assessment;

(22) A list showing the status of and estimated completion date of Applicant's required project-related applications or approvals for Federal, State, and local permits and authorizations to site, construct, and operate the project;

(23) A report containing an analysis of the potential environmental impacts of the project that will enable DOE to assess whether the project will comply with all applicable environmental requirements, and that will enable DOE to undertake and complete any necessary reviews under the National Environmental Policy Act of 1969;

(24) A listing and description of assets associated, or to be associated, with the project and any other asset that will serve as collateral for the Guaranteed Obligations, including appropriate data as to the value of the assets and the useful life of any physical assets. With respect to real property assets listed, an appraisal that is consistent with the ''Uniform Standards of Professional Appraisal Practice,'' promulgated by the Appraisal Standards Board of the Appraisal Foundation, and performed by licensed or certified appraisers, is required;

(25) An analysis demonstrating that, at the time of the Application, there is a reasonable prospect that Borrower will be able to repay the Guaranteed Obligations (including interest) according to their terms, and a complete description of the operational and financial assumptions and methodologies on which this demonstration is based;

(26) Written affirmation from an officer of the Eligible Lender or other Holder confirming that it is in good standing with DOE's and other Federal agencies' loan guarantee programs;

(27) A list of all of the requirements contained in this part and the solicitation and where in the Application these requirements are addressed;

(28) A statement from the Applicant that it believes that there is ''reasonable prospect'' that the Guaranteed Obligations will be fully paid from project revenue; and

(29) Any other information requested in the invitation to submit an Application or requests from DOE in order to clarify an Application;

(c) DOE will not consider any Application complete unless the Applicant has paid the First Fee and the Application is signed by the appropriate entity or entities with the authority to bind the Applicant to the commitments and representations made in the Application.

§ 609.7 Programmatic, technical and financial evaluation of Applications.

(a) In reviewing completed Applications, and in prioritizing and selecting those to whom a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, the applicable solicitation, and this part. Applications will be considered in a competitive process, *i.e.* each Application will be evaluated against other Applications responsive to the Solicitation. Greater weight will be given to applications that rely upon a smaller guarantee percentage, all else being equal. Concurrent with its review process, DOE will consult with the Secretary of the Treasury regarding the terms and conditions of the potential loan guarantee. Applications will be denied if:

(1) The project will be built or operated outside the United States;

(2) The project is not ready to be employed commercially in the United States, cannot yield a commercially

viable product or service in the use proposed in the project, does not have the potential to be employed in other commercial projects in the United States, and is not or will not be available for further commercial use in the United States;

(3) The entity or person issuing the loan or other debt obligations subject to the loan guarantee is not an Eligible Lender or other Holder, as defined in § 609.11 of this part;

(4) The project is for demonstration, research, or development.

(5) The project does not avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases; or

(6) The Applicant will not provide an equity contribution.

(b) In evaluating Applications, DOE will consider the following factors:

(1) To what measurable extent the project avoids, reduces, or sequesters air pollutants or anthropogenic emissions of greenhouses gases;

(2) To what extent the new or significantly improved technology to be employed in the project, as compared to Commercial Technology in general use in the United States, is ready to be employed commercially in the United States, can be replicated, yields a commercially viable project or service in the use proposed in the project, has potential to be employed in other commercial projects in the United States, and is or will be available for further commercial use in the United States;

(3) To what extent the new or significantly improved technology used in the project constitutes an important improvement in technology, as compared to Commercial Technology, used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases, and the Applicant has a plan to advance or assist in the advancement of that technology into the commercial marketplace;

(4) The extent to which the requested amount of the loan guarantee, the requested amount of Guaranteed Obligations and, if applicable, the expected amount of any other financing or credit arrangements are reasonable relative to the nature and scope of the project;

(5) The total amount and nature of the Eligible Project Costs and the extent to which Project Costs are funded by Guaranteed Obligations;

(6) The likelihood that the project will be ready for full commercial operations in the time frame stated in the Application;

(7) The amount of equity commitment to the project by the Applicant and other principals involved in the project;

(8) Whether there is sufficient evidence that the Applicant will diligently pursue the project, including initiating and completing the project in a timely manner;

(9) Whether and to what extent the Applicant will rely upon other Federal and non-Federal governmental assistance such as grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the project and how such assistance will impact the project;

(10) The feasibility of the project and likelihood that the project will produce sufficient revenues to service the project's debt obligations over the life of the loan guarantee and assure timely repayment of Guaranteed Obligations;

(11) The levels of safeguards provided to the Federal government in the event of default through collateral, warranties, and other assurance of repayment described in the Application, including the nature of any anticipated intercreditor arrangements;

(12) The Applicant's capacity and expertise to successfully operate the project, based on factors such as financial soundness, management organization, and the nature and extent of corporate and personal experience;

(13) The ability of the applicant to ensure that the project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations;

(14) The levels of market, regulatory, legal, financial, technological, and other risks associated with the project and their appropriateness for a loan guarantee provided by DOE;

(15) Whether the Application contains sufficient information, including a detailed description of the nature and scope of the project and the nature, scope, and risk coverage of the loan guarantee sought to enable DOE to perform a thorough assessment of the project; and

(16) Such other criteria that DOE deems relevant in evaluating the merits of an Application.

(c) During the Application review process DOE may raise issues or concerns that were not raised during the Pre-Application review process where a Pre-Application was requested in the applicable solicitation.

(d) If DOE determines that a project may be suitable for a loan guarantee, DOE will notify the Applicant and Eligible Lender or other Holder in writing and provide them with a Term Sheet. If DOE reviews an Application and decides not to proceed further with the issuance of a Term Sheet, DOE will inform the Applicant in writing of the reason(s) for denial.

§ 609.8 Term sheets and conditional commitments.

(a) DOE, after review and evaluation of the Application, additional information requested and received by DOE, potentially including a preliminary credit rating or credit assessment, and information obtained as the result of meeting with the Applicant and the Eligible Lender or other Holder, may offer to an Applicant and the Eligible Lender or other Holder detailed terms and conditions that must be met, including terms and conditions that must be met by the Applicant and the Eligible Lender or other Holder.

(b) The terms and conditions required by DOE will be expressed in a written Term Sheet signed by a Contracting Officer and addressed to the Applicant and the Eligible Lender or other Holder, where appropriate. The Term Sheet will request that the Project Sponsor and the Eligible Lender or other Holder express agreement with the terms and conditions contained in the Term Sheet by signing the Term Sheet in the designated place. Each person signing the Term Sheet must be a duly authorized official or officer of the Applicant and Eligible Lender or other Holder. The Term Sheet will include an expiration date on which the terms offered will expire unless the Contracting Officer agrees in writing to extend the expiration date.

(c) The Applicant and/or the Eligible Lender or other Holder may respond to the Term Sheet offer in writing or may request discussions or meetings on the terms and conditions contained in the Term Sheet, including requests for clarifications or revisions. When DOE, the Applicant, and the Eligible Lender or other Holder agree on all of the final terms and conditions and all parties sign the Term Sheet, the Term Sheet becomes a Conditional Commitment. When and if all of the terms and conditions specified in the Conditional Commitment have been met, DOE and the Applicant may enter into a Loan Guarantee Agreement.

(d) DOE's obligations under each Conditional Commitment are conditional upon statutory authority having been provided in advance of the execution of the Loan Guarantee Agreement sufficient under FCRA and Title XVII for DOE to execute the Loan Guarantee Agreement, and either an appropriation has been made or a borrower has paid into the Treasury sufficient funds to cover the full Credit Subsidy Cost for the loan guarantee that

is the subject of the Conditional Commitment.

(e) The Applicant is required to pay fees to DOE to cover the Administrative Cost of Issuing a Loan Guarantee for the period of the Term Sheet through the closing of the Loan Guarantee Agreement (Second Fee).

§ 609.9 Closing on the Loan Guarantee Agreement.

(a) Subsequent to entering into a Conditional Commitment with an Applicant, DOE, after consultation with the Applicant, will set a closing date for execution of a Loan Guarantee Agreement.

(b) By the closing date, the Applicant and the Eligible Lender or other Holder must have satisfied all of the detailed terms and conditions contained in the Conditional Commitment and other related documents and all other contractual, statutory, and regulatory requirements. If the Applicant and the Eligible Lender or other Holder has not satisfied all such terms and conditions by the closing date, the Secretary may, in his/her sole discretion, set a new closing date or terminate the Conditional Commitment.

(c) In order to enter into a Loan Guarantee Agreement at closing:

(1) DOE must have received authority in an appropriations act for the loan guarantee; and

(2) All other applicable statutory, regulatory, or other requirements must be fulfilled.

(d) Prior to, or on, the closing date, DOE will ensure that:

(1) Pursuant to section 1702(b) of the Act, DOE has received payment of the Credit Subsidy Cost of the loan guarantee, as defined in § 609.2 of this part from *either* (but not from a combination) of the following:

(i) A Congressional appropriation of funds; or

(ii) A payment from the Borrower.

(2) Pursuant to section 1702(h) of the Act, DOE has received from the Borrower the First and Second Fees and, if applicable, the Third fee, or portions thereof, for the Administrative Cost of Issuing the Loan Guarantee, as specified in the Loan Guarantee Agreement;

(3) OMB has reviewed and approved DOE's calculation of the Credit Subsidy Cost of the loan guarantee;

(4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement;

(5) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interest of the United States; and

(6) All conditions precedent specified in the Conditional Commitment are either satisfied or waived by a Contracting Officer and all other applicable contractual, statutory, and regulatory requirements are satisfied.

(e) Not later than the period approved in writing by the Contracting Officer, which may not be less than 30 days prior to the closing date, the Applicant must provide in writing updated project financing information if the terms and conditions of the financing arrangements changed between execution of the Conditional Commitment and that date. The Conditional Commitment must be updated to reflect the revised terms and conditions.

(f) Where the total Project Costs for an Eligible Project are projected to exceed $25 million, the Applicant must provide a credit rating from a nationally recognized rating agency reflecting the revised Conditional Commitment for the project without a Federal guarantee. Where total Project Costs are projected to be $25 million or less than $25 million, the Secretary may, on a case-by-case basis, require a credit rating. If a rating is required, an updated rating must be provided to the Secretary not later than 30 days prior to closing.

(g) Changes in the terms and conditions of the financing arrangements will affect the Credit Subsidy Cost for the Loan Guarantee Agreement. DOE may postpone the expected closing date pursuant to any changes submitted under paragraph (e) and (f) of this section. In addition, DOE may choose to terminate the Conditional Commitment.

§ 609.10 Loan Guarantee Agreement.

(a) Only a Loan Guarantee Agreement executed by a duly authorized DOE Contracting Officer can contractually obligate DOE to guarantee loans or other debt obligations.

(b) DOE is not bound by oral representations made during the Pre-Application stage, if Pre-Applications were solicited, or Application stage, or during any negotiation process.

(c) Except if explicitly authorized by an Act of Congress, no funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to pay for Credit Subsidy Costs, administrative fees, or other fees charged by or paid to DOE relating to the Title XVII program or any loan guarantee there under.

(d) Prior to the execution by DOE of a Loan Guarantee Agreement, DOE must ensure that the following requirements and conditions are satisfied:

(1) The project qualifies as an Eligible Project under the Act and is not a research, development, or demonstration project or a project that employs Commercial Technologies in service in the United States;

(2) The project will be constructed and operated in the United States, the employment of the new or significantly improved technology in the project has the potential to be replicated in other commercial projects in the United States, and this technology is or is likely to be available in the United States for further commercial application;

(3) The face value of the debt guaranteed by DOE is limited to no more than 80 percent of total Project Costs;

(4)(i) Where DOE guarantees 100 percent of the Guaranteed Obligation, the loan shall be funded by the Federal Financing Bank;

(ii) Where DOE guarantees more than 90 percent of the Guaranteed Obligation, the guaranteed portion cannot be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation if the loan is participated, syndicated or otherwise resold in the secondary market;

(iii) Where DOE guarantees 90 percent or less of the Guaranteed Obligation, the guaranteed portion may be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation, if the loan is participated, syndicated or otherwise resold in the secondary debt market;

(5) The Borrower and other principals involved in the project have made or will make a significant equity investment in the project;

(6) The Borrower is obligated to make full repayment of the principal and interest on the Guaranteed Obligation and other project debt over a period of up to the lesser of 30 years or 90 percent of the projected useful life of the project's major physical assets, as calculated in accordance with generally accepted accounting principles and practices. The non-guaranteed portion (if any) of any Guaranteed Obligation must be repaid on a pro-rata basis, and may not be repaid on a shorter or faster amortization schedule than the guaranteed portion. Any project-related financing or credit arrangement (other than the Guaranteed Obligation) may have a shorter or faster amortization schedule than the Guaranteed Obligation if DOE determines that the resulting financing structure of the project—

(i) Allocates to DOE a reasonably proportionate share of the default risk, in light of—

(A) DOE's share of the total project financing,

(B) Risk allocation among the credit providers, and

(C) Internal and external credit enhancements; and

(ii) Is appropriate to assure reasonable prospect of repayment of the principal of and interest on the DOE Guaranteed Obligation and to protect the interests of the United States in the case of default;

(7) The loan guarantee does not finance, either directly or indirectly, tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;

(8) The amount of the loan guaranteed, when combined with other funds committed to the project, will be sufficient to carry out the project, including adequate contingency funds;

(9) There is a reasonable prospect of repayment by Borrower of the principal of and interest on the Guaranteed Obligations and other project debt;

(10) The Borrower has pledged project assets and other collateral or surety, including non project-related assets, determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations;

(11) The Loan Guarantee Agreement and related documents include detailed terms and conditions necessary and appropriate to protect the interest of the United States in the case of default, including ensuring availability of all the intellectual property rights, technical data including software, and technology necessary for any person or entity selected, including DOE, to complete, operate, convey, and dispose of the defaulted project;

(12) The interest rate on any Guaranteed Obligation is determined by DOE, after consultation with the Treasury Department, to be reasonable, taking into account the range of interest rates prevailing in the private sector for similar obligations of comparable risk guaranteed by the Federal government;

(13) Any Guaranteed Obligation is not subordinate to any loan or other debt obligation;

(14) There is satisfactory evidence that Borrower and Eligible Lenders or other Holders are willing, competent, and capable of performing the terms and conditions of the Guaranteed Obligations and other debt obligation and the Loan Guarantee Agreement, and will diligently pursue the project;

(15) The Borrower has made the initial (or total) payment of fees for the Administrative Cost of Issuing a Loan Guarantee for the construction and operational phases of the project (Third Fee), as specified in the Conditional Commitment;

(16) The Eligible Lender, other Holder or servicer has taken and is obligated to continue to take those actions necessary to perfect and maintain liens on assets which are pledged as collateral for the Guaranteed Obligation;

(17) If Borrower is to make payment in full for the Credit Subsidy Cost of the loan guarantee pursuant to section 1702(b)(2) of the Act, such payment must be received by DOE prior to, or at the time of, closing;

(18) DOE or its representatives have access to the project site at all reasonable times in order to monitor the performance of the project;

(19) DOE, the Eligible Lender, or other Holder and Borrower have reached an agreement as to the information that will be made available to DOE and the information that will be made publicly available;

(20) The prospective Borrower has filed applications for or obtained any required regulatory approvals for the project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, State, and local regulatory requirements;

(21) The Borrower has no delinquent Federal debt, including tax liabilities, unless the delinquency has been resolved with the appropriate Federal agency in accordance with the standards of the Debt Collection Improvement Act of 1996;

(22) The Loan Guarantee Agreement and related agreements contain such other terms and conditions as DOE deems reasonable and necessary to protect the interests of the United States, including without limitation provisions for (i) such collateral and other credit support for the Guaranteed Obligation, and (ii) such collateral sharing, priorities (subject always to Section 1702(d)(3) of Title XVII) and voting rights among creditors and other intercreditor arrangements as, in each case, DOE deems reasonable and necessary to protect the interests of the United States; and

(23)(i) The Lender is an Eligible Lender, as defined in § 609.2 of this part, and meets DOE's lender eligibility and performance requirement contained in §§ 609.11 (a) and (b) of this part; and

(ii) The servicer meets the servicing performance requirements of § 609.11(c) of this part.

(e) The Loan Guarantee Agreement must provide that, in the event of a default by the Borrower:

(1) Interest accrues on the Guaranteed Obligations at the rate stated in the Loan Guarantee Agreement or Loan Agreement, until DOE makes full payment of the defaulted Guaranteed Obligations and, except when debt is funded through the Federal Financing Bank, DOE is not required to pay any premium, default penalties, or prepayment penalties;

(2) Upon payment of the Guaranteed Obligations by DOE, DOE is subrogated to the rights of the Holders of the debt, including all related liens, security, and collateral rights;

(3) The Eligible Lender or other servicer acting on DOE's behalf is obligated to take those actions necessary to perfect and maintain liens on assets which are pledged as collateral for the Guaranteed Obligations;

(4) The holder of pledged collateral is obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery upon default by the Borrower on the Guaranteed Obligations;

(f) The Loan Guarantee Agreement must contain audit provisions which provide, in substance, as follows:

(1) The Eligible Lender or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, must keep such records concerning the project as are necessary to facilitate an effective and accurate audit and performance evaluation of the project as required in § 609.17 of this part; and

(2) DOE and the Comptroller General, or their duly authorized representatives, must have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the Borrower, Eligible Lender or other Holder, or other party servicing the Guaranteed Obligations, as applicable. Examination of records may be made during the regular business hours of the Borrower, Eligible Lender or other Holder, or other party servicing the Guaranteed Obligations, or at any other time mutually convenient as required in § 609.17 of this part.

(g)(1) An Eligible Lender or other Holder may sell, assign or transfer a Guaranteed Obligation to another Eligible Lender that meets the requirements of § 609.11 of this part. Such Eligible Lender to which a Guaranteed Obligation is assigned or transferred, is required to fulfill all servicing, monitoring, and reporting requirements contained in the Loan Guarantee Agreement and these regulations if the transferring Eligible Lender was performing these functions and transfer such functions to the new Eligible Lender. Any assignment or transfer, however, of the servicing, monitoring, and reporting functions

must be approved by DOE in writing in advance of such assignment.

(2) The Secretary, or the Secretary's designee or contractual agent, for the purpose of identifying Holders with the right to receive payment under the guarantees shall include in the Loan Guarantee Agreement or related documents a procedure for tracking and identifying Holders of Guarantee Obligations. These duties usually will be performed by the servicer. Any contractual agent approved by the Secretary to perform this function cannot transfer or assign this responsibility without the prior written consent of the Secretary.

§ 609.11 Lender eligibility and servicing requirements.

(a) An Eligible Lender shall meet the following requirements:

(1) Not be debarred or suspended from participation in a Federal government contract (under 48 CFR part 9.4) or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR Part 180);

(2) Not be delinquent on any Federal debt or loan;

(3) Be legally authorized to enter into loan guarantee transactions authorized by the Act and these regulations and is in good standing with DOE and other Federal agency loan guarantee programs;

(4) Be able to demonstrate, or has access to, experience in originating and servicing loans for commercial projects similar in size and scope to the project under consideration; and

(5) Be able to demonstrate experience or capability as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience; or

(6) Be the Federal Financing Bank.

(b) When performing its duties to review and evaluate a proposed Eligible Project prior to the submission of a Pre-Application or Application, as appropriate, by the Project Sponsor through the execution of a Loan Guarantee Agreement, the Eligible Lender or DOE if loans are funded by the Federal Financing Bank, shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating and disbursing a loan made by it without a Federal guarantee.

(c) The servicing duties shall be performed by the Eligible Lender, DOE or other servicer if approved by the Secretary. When performing the servicing duties the Eligible Lender, DOE or other servicer shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, enforcing all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement and related documents;

(2) During the operational phase, monitoring and servicing the Debt Obligations and collection of the outstanding principal and accrued interest as well as ensuring that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) As specified by DOE, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or other debt obligations.

(d) With regard to partial guarantees, even though DOE may in part rely on the Eligible Lender or other servicer to service and monitor the Guaranteed Obligation, DOE will also conduct its own independent monitoring and review of the Eligible Project.

§ 609.12 Project Costs.

(a) Before entering into a Loan Guarantee Agreement, DOE shall determine the estimated Project Costs for the project that is the subject of the agreement. To assist the Department in making that determination, the Applicant must estimate, calculate and record all such costs incurred in the design, engineering, financing, construction, startup, commissioning and shakedown of the project in accordance with generally accepted accounting principles and practices. Among other things, the Applicant must calculate the sum of necessary, reasonable and customary costs that it has paid and expects to pay, which are directly related to the project, including costs for escalation and contingencies, to estimate the total Project Costs.

(b) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility; and materials, labor, services, travel and transportation for facility design, construction, startup, commissioning and shakedown;

(3) Costs of equipment purchases;

(4) Costs to provide equipment, facilities, and services related to safety and environmental protection;

(5) Financial and legal services costs, including other professional services and fees necessary to obtain required licenses and permits and to prepare environmental reports and data;

(6) The cost of issuing project debt, such as fees, transaction and legal costs and other normal charges imposed by Eligible Lenders and other Holders;

(7) Costs of necessary and appropriate insurance and bonds of all types;

(8) Costs of design, engineering, startup, commissioning and shakedown;

(9) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the project;

(10) A reasonable contingency reserve for cost overruns during construction; and

(11) Capitalized interest necessary to meet market requirements, reasonably required reserve funds and other carrying costs during construction; and

(12) Other necessary and reasonable costs.

(c) Project Costs do not include:

(1) Fees and commissions charged to Borrower, including finder's fees, for obtaining Federal or other funds;

(2) Parent corporation or other affiliated entity's general and administrative expenses, and non-project related parent corporation or affiliated entity assessments, including organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Research, development, and demonstration costs of readying the innovative energy or environmental technology for employment in a commercial project;

(6) Costs that are excessive or are not directly required to carry out the project, as determined by DOE, including but not limited to the cost of hedging instruments;

(7) Expenses incurred after startup, commissioning, and shakedown before the facility has been placed in service;

(8) Borrower-paid Credit Subsidy Costs and Administrative Costs of Issuing a Loan Guarantee; and

(9) Operating costs.

§ 609.13 Principal and interest assistance contract.

With respect to the guaranteed portion of any Guaranteed Obligation, and subject to the availability of appropriations, DOE may enter into a contract to pay Holders, for and on behalf of Borrower, from funds appropriated for that purpose, the principal and interest charges that become due and payable on the unpaid balance of the guaranteed portion of the Guaranteed Obligation, if DOE finds that:

(a) The Borrower:

(1) Is unable to make the payments and is not in default; and

(2) Will, and is financially able to, continue to make the scheduled payments on the remaining portion of the principal and interest due under the non-guaranteed portion of the debt obligation, if any, and other debt obligations of the project, or an agreement, approved by DOE, has otherwise been reached in order to avoid a payment default on non-guaranteed debt.

(b) It is in the public interest to permit Borrower to continue to pursue the purposes of the project;

(c) In paying the principal and interest, the Federal government expects a probable net benefit to the Government will be greater than that which would result in the event of a default;

(d) The payment authorized is no greater than the amount of principal and interest that Borrower is obligated to pay under the terms of the Loan Guarantee Agreement; and

(e) Borrower agrees to reimburse DOE for the payment (including interest) on terms and conditions that are satisfactory to DOE and executes all written contracts required by DOE for such purpose.

§ 609.14 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of all Guaranteed Obligations issued in accordance with this part with respect to principal and interest. Such guarantee shall be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such guarantee; and that, but for fraud or material misrepresentation by the Holder, such guarantee will be presumed to be valid, legal, and enforceable.

§ 609.15 Default, demand, payment, and collateral liquidation.

(a) In the event that the Borrower has defaulted in the making of required payments of principal or interest on any portion of a Guaranteed Obligation, and such default has not been cured within the period of grace provided in the Loan Guarantee Agreement and/or the Loan Agreement, the Eligible Lender or other Holder, or nominee or trustee empowered to act for the Eligible Lender or other Holder (referred to in this section collectively as ''Holder''), may make written demand upon the Secretary for payment pursuant to the provisions of the Loan Guarantee Agreement.

(b) In the event that the Borrower is in default as a result of a breach of one or more of the terms and conditions of the Loan Guarantee Agreement, note, mortgage, Loan Agreement, or other contractual obligations related to the transaction, other than the Borrower's obligation to pay principal or interest on the Guaranteed Obligation, as provided in paragraph (a) of this section, the Holder will not be entitled to make demand for payment pursuant to the Loan Guarantee Agreement, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the Holder should be entitled to receive payment pursuant to the Loan Guarantee Agreement.

(c) In the event that the Borrower has defaulted as described in paragraph (a) of this section and such default is not cured during the grace period provided in the Loan Guarantee Agreement, the Secretary shall notify the U.S. Attorney General and, subject to the terms of any applicable Intercreditor Agreement, may cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without the need for consent or other action on the part of the Holders of the Guaranteed Obligations) and may exercise any other remedies available under the applicable agreements. In the event the Borrower is in default as described in paragraph (b) of this section, where the Secretary determines in writing that such a default has materially affected the rights of the parties, the Borrower shall be given the period of grace provided in the Loan Guarantee Agreement to cure such default. If the default is not cured during the period of grace, the Secretary may, subject to the terms of any applicable Intercreditor Agreement, cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without any need for consent or other action on the part of the Holders of the Guaranteed Obligations) and may exercise any other remedies available under the applicable agreements.

(d) No provision of this regulation shall be construed to preclude forbearance by any Holder with the consent of the Secretary for the benefit of the Borrower.

(e) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the Holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Secretary, the supporting documentation specified in the Loan Guarantee Agreement and any other supporting documentation as may reasonably be required to justify such demand.

(f) Payment as required by the Loan Guarantee Agreement of the Guaranteed Obligation shall be made 60 days after receipt by the Secretary of written demand for payment, provided that the demand complies with the terms of the Loan Guarantee Agreement. The Loan Guarantee Agreement shall provide that interest shall accrue to the Holder at the rate stated in the Loan Guarantee Agreement until the Guaranteed Obligation has been fully paid by the Federal government.

(g) The Loan Guarantee Agreement shall provide that, upon payment of the Guaranteed Obligations, the Secretary shall be subrogated to the rights of the Holders. The Holder shall transfer and assign to the Secretary all rights held by the Holder of the Guaranteed Obligation. Such assignment shall include all related liens, security, and collateral rights to the extent held by the Holder.

(h) Where the Loan Guarantee Agreement or any applicable Intercreditor Agreement so provides, the Eligible Lender or other Holder, or other agent or servicer, as appropriate, and the Secretary may jointly agree to a work-out strategy and/or a plan of liquidation of the assets pledged to secure the Guaranteed Obligation and other applicable debt.

(i) Where payment of the Guaranteed Obligation has been made (or at any such earlier time as may be permitted by applicable agreements), the Secretary, acting through the U.S. Attorney General, in accordance with the rights received through subrogation or other applicable agreements, subject to any applicable Intercreditor Agreement, may

seek to foreclose on the collateral assets and/or take such other legal action as necessary for the protection of the Government.

(j) If the Secretary (or an agent acting for the benefit of the Secretary) is awarded title to collateral assets pursuant to a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, or lease such assets, or otherwise dispose of any such assets or take any other necessary action which the Secretary deems appropriate (and consistent with any applicable Intercreditor Agreement), in order that the original goals and objectives of the project will, to the extent possible, be realized.

(k) In addition to foreclosure and sale of collateral pursuant thereto, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the Loan Guarantee Agreement and any applicable Intercreditor Agreement to recover costs incurred by, and other amounts owed to, the Government as a result of the defaulted loan or other defaulted obligation. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner: First to the expenses incurred by the U.S. Attorney General, DOE and any agent acting for the benefit of DOE in effecting such recovery; second, to reimbursement of any amounts paid by DOE, and to pay any other amounts owed to DOE, as a result of the defaulted obligation; third, to any amounts owed to DOE under related principal and interest assistance contracts; and fourth, to any other lawful claims held by the Government on such process. Any sums remaining after full payment of the foregoing shall be available for the benefit of other parties lawfully entitled to claim them.

(l) If there was a partial guarantee by DOE of the Guaranteed Obligation or if any other creditors are secured by a lien on collateral pledged to secure the Guaranteed Obligation, the proceeds received by the collateral agent or other responsible party as a result of any liquidation or sale of, collection from or other realization on any such collateral may, if so agreed in advance or unless otherwise agreed in the applicable agreements, be applied as follows (with any money distributed to the Federal Government to be further distributed according to § 609.15(k)):

(1) First, to the payment of reasonable and customary fees and expenses incurred in the liquidation or sale, collection or other realization (including without limitation any fees and expenses that the Attorney General of the United States is lawfully entitled to claim in connection with such action);

(2) Second, distributed among the Holders of the Guaranteed Obligation (including DOE, as subrogee) and the other creditors entitled to share in such proceeds on no greater than a pro rata share basis; and

(3) Third, as otherwise provided in the applicable agreement or agreements.

(m) No action taken by the Eligible Lender or other Holder or other agent or servicer in respect of any pledged assets will affect the rights of any party, including the Secretary, having an interest in the loan or other debt obligations, to pursue, jointly or severally, to the extent provided in the Loan Guarantee Agreement or other applicable agreement, legal action against the Borrower or other liable parties, for any deficiencies owing on the balance of the Guaranteed Obligations or other debt obligations after application of the proceeds received upon liquidation.

(n) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with the liquidation or sale of, collection from or other realization on the collateral or recovery of deficiencies due under the loan, the Secretary will take such action as may be appropriate under the circumstances.

(o) Nothing in this part precludes the Secretary from purchasing any Holder's or other person's interest in the project upon liquidation or sale of, collection from or other realization on the collateral.

§ 609.16 Perfection of liens and preservation of collateral.

(a) The Loan Guarantee Agreement and other documents related thereto shall provide that:

(1) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where the loan is funded by the Federal Financing Bank, or other Holder or other agent or servicer will take those actions necessary or appropriate to perfect and maintain liens, as applicable, on assets which are pledged as collateral for the Guaranteed Obligation; and

(2) Upon default by the Borrower, the holder of pledged collateral shall take such actions as the Secretary (subject to any applicable Intercreditor Agreement) may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the pledged assets. The Secretary shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary (unless otherwise provided in applicable agreements). Except as provided in § 609.15, no party may waive or relinquish, without the consent of the Secretary, any collateral securing the Guaranteed Obligation to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as the Secretary (subject to any applicable Intercreditor Agreement) determines are required or appropriate to care for, preserve, protect or maintain the collateral. The cost of such contracts may be charged to the Borrower.

§ 609.17 Audit and access to records.

(a) The Loan Guarantee Agreement and related documents shall provide that:

(1) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where loans are funded by the Federal Financing Bank or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the project as is necessary, including the Pre-Application, Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all project assets and non-project assets pledged as security for the Guaranteed Obligations, all off-take and other revenue producing agreements, documentation for all project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals and all other documents and records relating to the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the project; and

(2) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers and records of the Borrower, Eligible Lender or DOE or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower, Eligible Lender or DOE or other Holder, or other party servicing the Eligible Project and the Guaranteed Obligations, as applicable, or at any other time mutually convenient.

(b) The Secretary may from time to time audit any or all items of costs included as Project Costs in statements or certificates submitted to the Secretary or the servicer or otherwise, and may exclude or reduce the amount of any item which the Secretary determines to be unnecessary or excessive, or otherwise not to be an item of Project Costs. The Borrower will make available to the Secretary all books and records and other data available to the Borrower in order to permit the Secretary to carry out such audits. The Borrower will represent that it has within its rights access to all financial and operational records and data relating to Project Costs, and agrees that it will, upon request by the Secretary, exercise such rights in order to make such financial and operational records and data available to the Secretary. In exercising its rights hereunder, the Secretary may utilize employees of other Federal agencies, independent accountants, or other persons.

§ 609.18 Deviations.

To the extent that such requirements are not specified by the Act or other applicable statutes, DOE may authorize deviations on an individual request basis from the requirements of this part upon a finding that such deviation is essential to program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government. DOE will consult with OMB and the Secretary of the Treasury before DOE grants any deviation that would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents. Any deviation, however, that was not captured in the Credit Subsidy Cost will require either additional fees or discretionary appropriations. A recommendation for any deviation shall be submitted in writing to DOE. Such recommendation must include a supporting statement, which indicates briefly the nature of the deviation requested and the reasons in support thereof.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE302; Special Conditions No. 23–242–SC]

Special Conditions: Embraer S.A. Model EMB–505; Flight Performance, Flight Characteristics, High Speed Conditions, and Operating Limitations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Embraer S.A. Model EMB–505 airplane. The EMB 505 is an all-new, high-performance, sweep wing, twin turbofan powered aircraft. This airplane will have a novel or unusual design feature(s) which include turbofan engines, aft engine location, new avionics, a trimmable horizontal tail, and performance characteristics inherent in this type of airplane that were not envisioned by the existing regulations. In addition, this airplane is a jet airplane being certificated in the commuter category by exemption. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is November 25, 2009.

We must receive your comments by January 4, 2010.

ADDRESSES: Mail two copies of your comments to: Federal Aviation Administration, Regional Counsel, ACE–7, Attn: Rules Docket No. CE302, 901 Locust, Kansas City, Missouri 64106. You may deliver two copies to the Regional Counsel at the above address. Mark your comments: Docket No. CE302. You may inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: J. Lowell Foster, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE–111, 901 Locust, Room 301, Kansas City, Missouri 64106; 816–329–4125, fax 816–329–4090.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel about these special conditions. You may inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive by the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to let you know we received your comments on these special conditions, send us a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On October 9, 2006, Embraer S.A. applied for a type certificate for their new Model EMB–505. The Model EMB–505 is a commuter category, low-winged monoplane with ''T'' tailed vertical and horizontal stabilizers, retractable tricycle type landing gear and twin turbofan engines mounted on the aircraft fuselage. Its design characteristics include a predominance of metallic construction. The maximum takeoff weight is 17,967 pounds, the V_{MO}/M_{MO} is 320 KCAS/M 0.78 and maximum altitude is 45,000 feet.

For the past decade, the Federal Aviation Administration (FAA) has applied special conditions to jets. The

special conditions have varied based on the jet's performance, but in general jets weighing more than 6,000 lbs. have had the commuter category performance requirements applied. Since this is a commuter category airplane, most of the existing jet special conditions are contained in part 23 and already apply. Existing part 23 flying qualities requirements tend to provide a higher level of safety than part 25 (to address a lower pilot skill base), so there is little change needed for jets except for the allowance of turbojet related terms such as V_{FC}/M_{FC} and V_{DF}/M_{DF}. Special conditions for flying qualities, stability, and control also reflect speed ranges appropriate for this class of jet. High speed conditions including flutter, vibration, and high speed characteristics have been applied to jets depending on their speed range and configuration. Since the EMB Model 505 will have a trimmable horizontal tail, operate above 25,000 ft., and have a M_D greater than M0.6, it will have all of the high speed special conditions applied to it. These special conditions come directly from part 25.

Several 14 CFR part 23 paragraphs have been replaced by or supplemented with special conditions. These special conditions have been numbered to match the 14 CFR part 23 paragraph they replace or supplement. Additionally many of the other applicable part 23 paragraphs cross-reference paragraphs that are replaced by or supplemented with special conditions. For example, § 23.141 states, ''The airplane must meet the requirements of § 23.143 through § 23.253 * * *'' Within this range of paragraphs, there are special conditions associated with § 23.177, § 23.203, § 23.252, and § 23.253. The special conditions associated with these paragraphs supersede the original paragraphs and must be applied. This principle applies to all part 23 paragraphs that cross-reference paragraphs associated with special conditions.

Type Certification Basis

Under the provisions of 14 CFR part 23 § 23.141, Embraer S.A. must show that the Model EMB–505 meets the applicable provisions of 14 CFR part 23, as amended by §§ 23.143 through 23.253, thereto.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 23) do not contain adequate or appropriate safety standards for the Model EMB–505 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Model EMB–505 must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36, and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as appropriate, as defined in 11.19, under § 11.38, and they become part of the type certification basis under § 21.17(a)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the special conditions would also apply to the other model.

Novel or Unusual Design Features

The Embraer S.A. Model EMB–505 will incorporate the following novel or unusual design features:

Flight Performance, Flight Characteristics, High Speed Conditions, and Operating Limitations.

Applicability

As discussed above, these special conditions are applicable to the Model EMB–505. Should Embraer S. A. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model, Model EMB–505, of airplane. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register**; however, as the certification date for the Embraer S. A. Model EMB–505 is imminent, the FAA finds that good cause exists to make these special conditions effective upon issuance.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.17; and 14 CFR 11.38 and 11.19.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Embraer S. A. Model EMB–505 airplanes.

The following special conditions will apply:

1. SC 23.177 Static directional and lateral stability.

Instead of compliance with § 23.177, the following apply:

(a) The static directional stability, as show by the tendency to recover from a wings level sideslip with the rudder free, must be positive for any landing gear and flap position appropriate to the takeoff, climb, cruise, approach, and landing configurations. This must be shown with symmetrical power up to maximum continuous power, and at speeds from 1.2 V_{S1} up to V_{FE}, V_{LE}, or V_{FC}/M_{FC} (as appropriate). The angle of sideslip for these tests must be appropriate to the type of airplane. At larger angles of sideslip, up to that at which full rudder is used or a control force limit in § 23.143 is reached, whichever occurs first, and at speeds from 1.2 V_{S1} to V_O, the rudder pedal force must not reverse.

(b) The static lateral stability, as shown by the tendency to raise the low wing in a sideslip, must be positive for all landing gear and flap positions. This must be shown with symmetrical power up to 75 percent of maximum continuous power at speeds above 1.2 V_{S1} in the takeoff configuration(s) and at speeds above 1.3 V_{S1} in other configurations, up to V_{FE}, V_{LE}, V_{NO}, or V_{FC}/M_{FC} (as appropriate) for the configuration being investigated, in the takeoff, climb, cruise, and approach configurations. For the landing configuration, the power must be that necessary to maintain a 3 degree angle of descent in coordinated flight. The static lateral stability must not be negative at 1.2 V_{S1} in the takeoff configuration, or at 1.3 V_{S1} in other configurations. The angle of sideslip for these tests must be appropriate to the type of airplane, but in no case may the constant heading sideslip angle be less than that obtainable with a 10 degree bank, or if less, the maximum bank angle obtainable with full rudder deflection or 150 pound rudder force.

(c) In straight, steady slips at 1.2 V_{S1} for any landing gear and flap positions, and for any symmetrical power conditions up to 50 percent of maximum continuous power, the

aileron and rudder control movements and forces must increase steadily, but not necessarily in constant proportion, as the angle of sideslip is increased up to the maximum appropriate to the type of airplane. At larger slip angles, up to the angle at which the full rudder or aileron control is used or a control force limit contained in § 23.143 is reached, the aileron and rudder control movements and forces must not reverse as the angle of sideslip is increased. Rapid entry into, and recovery from, a maximum sideslip considered appropriate for the airplane must not result in uncontrollable flight characteristics.

2. SC 23.181 Dynamic stability.

Instead of compliance with § 23.181(d), the following apply:

(d) During the conditions as specified in § 23.175, when the longitudinal control force required to maintain speeds differing from the trim speed by at least plus and minus 15 percent or 15 kts, whichever is less, is released, the response of the airplane must not exhibit any dangerous characteristics nor be excessive in relation to the magnitude of the control force released. Any long-period oscillation of flight path, phugoid oscillation, that results must not be so unstable as to increase the pilot's workload or otherwise endanger the airplane.

3. SC 23.201(e) Wings level stall.

Instead of compliance with § 23.201(e), the following apply:

(e) Compliance with the requirements of this section must be shown under the following conditions:

(1) The flaps, landing gear, and speedbrakes in any likely combination of positions and altitudes appropriate for the various positions.

(2) Thrust-

(i) Idle; and

(ii) The thrust necessary to maintain level flight at $1.6V_{S1}$ (where V_{S1} corresponds to the stalling speed with flaps in the approach position, the landing gear retracted, and maximum landing weight).

(3) Trim at $1.4V_{S1}$ or the minimum trim speed, whichever is higher.

4. SC 23.203(c) Turning flight and accelerated turning stalls.

Instead of compliance with § 23.203(c), the following apply:

(c) Compliance with the requirements of this section must be shown under the following conditions:

(1) The flaps, landing gear, and speedbrakes in any likely combination of positions and altitudes appropriate for the various positions.

(2) Thrust—

(i) Idle; and

(ii) The thrust necessary to maintain level flight at $1.6V_{S1}$ (where V_{S1} corresponds to the stalling speed with flaps in the approach position, the landing gear retracted, and maximum landing weight).

(3) Trim at $1.4V_{S1}$ or the minimum trim speed, whichever is higher.

5. SC 23.251 Vibration and buffeting.

Instead of compliance with § 23.251, the following apply:

(a) The airplane must be demonstrated in flight to be free from any vibration and buffeting that would prevent continued safe flight in any likely operating condition.

(b) Each part of the airplane must be shown in flight to be free from excessive vibration under any appropriate speed and thrust conditions up to V_{DF}/M_{DF}. The maximum speeds shown must be used in establishing the operating limitations of the airplane in accordance with special condition § SC 23.1505.

(c) Except as provided in paragraph (d) of this special condition, there may be no buffeting condition, in normal flight, including configuration changes during cruise, severe enough to interfere with the control of the airplane, to cause excessive fatigue to the crew, or to cause structural damage. Stall warning buffeting within these limits is allowable.

(d) There may be no perceptible buffeting condition in the cruise configuration in straight flight at any speed up to V_{MO}/M_{MO}, except that stall warning buffeting is allowable.

(e) With the airplane in the cruise configuration, the positive maneuvering load factors at which the onset of perceptible buffeting occurs must be determined for the ranges of airspeed or Mach number, weight, and altitude for which the airplane is to be certified. The envelopes of load factor, speed, altitude, and weight must provide a sufficient range of speeds and load factors for normal operations. Probable inadvertent excursions beyond the boundaries of the buffet onset envelopes may not result in unsafe conditions.

6. SC 23.253 High speed characteristics.

Instead of compliance with § 23.253, the following apply:

(a) Speed increase and recovery characteristics. The following speed increase and recovery characteristics must be met:

(1) Operating conditions and characteristics likely to cause inadvertent speed increases (including upsets in pitch and roll) must be simulated with the airplane trimmed at any likely cruise speed up to V_{MO}/M_{MO}. These conditions and characteristics include gust upsets, inadvertent control movements, low stick force gradient in relation to control friction, passenger movement, leveling off from climb, and descent from Mach to airspeed limit altitudes.

(2) Allowing for pilot reaction time after effective inherent or artificial speed warning occurs, it must be shown that the airplane can be recovered to a normal attitude and its speed reduced to V_{MO}/M_{MO}, without:

(i) Exceptional piloting strength or skill;

(ii) Exceeding V_D/M_D, V_{DF}/M_{DF}, or the structural limitations; and

(iii) Buffeting that would impair the pilot's ability to read the instruments or control the airplane for recovery.

(3) There may be no control reversal about any axis at any speed up to V_{DF}/M_{DF}. Any reversal of elevator control force or tendency of the airplane to pitch, roll, or yaw must be mild and readily controllable, using normal piloting techniques.

(b) *Maximum speed for stability characteristics,* V_{FC}/M_{FC}. V_{FC}/M_{FC} is the maximum speed at which the requirements of § 23.175(b)(1), special condition § SC 23.177, and § 23.181 must be met with flaps and landing gear retracted. It may not be less than a speed midway between V_{MO}/M_{MO} and V_{DF}/M_{DF} except that, for altitudes where Mach number is the limiting factor, M_{FC} need not exceed the Mach number at which effective speed warning occurs.

7. SC 23.255 Out-of-trim characteristics.

In the absence of specific requirements for out-of-trim characteristics, apply the following:

(a) From an initial condition with the airplane trimmed at cruise speeds up to V_{MO}/M_{MO}, the airplane must have satisfactory maneuvering stability and controllability with the degree of out-of-trim in both the airplane nose-up and nose-down directions, which results from the greater of the following:

(1) A three-second movement of the longitudinal trim system at its normal rate for the particular flight condition with no aerodynamic load (or an equivalent degree of trim for airplanes that do not have a power-operated trim system), except as limited by stops in the trim system, including those required by § 23.655(b) for adjustable stabilizers; or

(2) The maximum mis-trim that can be sustained by the autopilot while maintaining level flight in the high speed cruising condition.

(b) In the out-of-trim condition specified in paragraph (a) of this special condition, when the normal acceleration is varied from +l g to the positive and negative values specified in paragraph

(c) of this special condition, the following apply:

(1) The stick force versus g curve must have a positive slope at any speed up to and including V_{FC}/M_{FC}; and

(2) At speeds between V_{FC}/M_{FC} and V_{DF}/M_{DF}, the direction of the primary longitudinal control force may not reverse.

(c) Except as provided in paragraph (d) and (e) of this special condition, compliance with the provisions of paragraph (a) of this special condition must be demonstrated in flight over the acceleration range as follows:

(1) -1 g to +2.5 g; or

(2) 0 g to 2.0 g, and extrapolating by an acceptable method to -1 g and +2.5 g.

(d) If the procedure set forth in paragraph (c)(2) of this special condition is used to demonstrate compliance and marginal conditions exist during flight test with regard to reversal of primary longitudinal control force, flight tests must be accomplished from the normal acceleration at which a marginal condition is found to exist to the applicable limit specified in paragraph (b)(1) of this special condition.

(e) During flight tests required by paragraph (a) of this special condition, the limit maneuvering load factors, prescribed in §§ 23.333(b) and 23.337, need not be exceeded. Also, the maneuvering load factors associated with probable inadvertent excursions beyond the boundaries of the buffet onset envelopes determined under special condition SC 23.251(e), need not be exceeded. In addition, the entry speeds for flight test demonstrations at normal acceleration values less than 1 g must be limited to the extent necessary to accomplish a recovery without exceeding V_{DF}/M_{DF}.

(f) In the out-of-trim condition specified in paragraph (a) of this special condition, it must be possible from an over speed condition at V_{DF}/M_{DF} to produce at least 1.5 g for recovery by applying not more than 125 pounds of longitudinal control force using either the primary longitudinal control alone or the primary longitudinal control and the longitudinal trim system. If the longitudinal trim is used to assist in producing the required load factor, it must be shown at V_{DF}/M_{DF} that the longitudinal trim can be actuated in the airplane nose-up direction with the primary surface loaded to correspond to the least of the following airplane nose-up control forces:

(1) The maximum control forces expected in service, as specified in §§ 23.301 and 23.397.

(2) The control force required to produce 1.5 g.

(3) The control force corresponding to buffeting or other phenomena of such intensity that is a strong deterrent to further application of primary longitudinal control force.

8. SC 23.1323 Airspeed indicating system.

Instead of compliance with § 23.1323(e), the following apply:

(e) In addition, the airspeed indicating system must be calibrated to determine the system error during the accelerate-takeoff ground run. The ground run calibration must be determined between 0.8 of the minimum value of V_1 to the maximum value of V_2, considering the approved ranges of altitude and weight. The ground run calibration must be determined assuming an engine failure at the minimum value of V_1.

9. SC 23.1505 Airspeed limitations.

Instead of compliance with § 23.1505, the following apply:

(a) The maximum operating limit speed (V_{MO}/M_{MO}-airspeed or Mach number, whichever is critical at a particular altitude) is a speed that may not be deliberately exceeded in any regime of flight (climb, cruise, or descent), unless a higher speed is authorized for flight test or pilot training operations. V_{MO}/M_{MO} must be established so that it is not greater than the design cruising speed V_C/M_C and so that it is sufficiently below V_D/M_D or V_{DF}/M_{DF}, to make it highly improbable that the latter speeds will be inadvertently exceeded in operations. The speed margin between V_{MO}/M_{MO} and V_D/M_D or V_{DF}/M_{DF} may not be less than that determined under § 23.335(b) or found necessary in the flight test conducted under special condition § SC 23.253.

Issued in Kansas City, Missouri, on November 25, 2009.

Margaret Kline,

Acting Manager, Small Airplane Directorate,

Aircraft Certification Service.

[FR Doc. E9–28896 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1130; Directorate Identifier 2009–SW–40–AD; Amendment 39–16130; AD 2009–25–10]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation (Sikorsky) Model S–92A Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the Sikorsky Model S–92A helicopters. This action requires a one-time visual inspection of the main gearbox (MGB) lube system filter assembly for oil filter damage. This action also requires if either the primary or secondary oil filter is damaged, replacing both filters, all packings, and the studs before further flight. This AD also requires replacing the oil filter bowl within 30 days after replacing a damaged filter and a daily leak inspection for an oil leak (no oil leaks allowed) during that 30-day interim period. This amendment is prompted by three reports of damaged oil filters or packings resulting from installing the filter assembly with an oversized packing possibly because of incorrect part numbers in the maintenance manual. Based on a previous accident investigation, failure of the oil filter bowl or mounting studs can result in sudden and complete loss of oil from the MGB. The actions specified in this AD are intended to prevent complete loss of oil from the MGB, failure of the MGB, and subsequent loss of control of the helicopter.

DATES: Effective December 21, 2009.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 21, 2009.

Comments for inclusion in the Rules Docket must be received on or before February 2, 2010.

ADDRESSES: Use one of the following addresses to submit comments on this AD:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–

30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may get the service information identified in this AD from Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, CT, telephone (203) 383–4866, e-mail address *tsslibrary@sikorsky.com,* or at *http://www.sikorsky.com.*

Examining the Docket: You may examine the docket that contains the AD, any comments, and other information on the Internet at *http://www.regulations.gov,* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located in Room W12–140 on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kirk Gustafson, Aviation Safety Engineer, Boston Aircraft Certification Office, Engine and Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803, telephone (781) 238–7190, fax (781) 238–7170.

SUPPLEMENTARY INFORMATION: This amendment adopts a new AD for the Sikorsky Model S–92A helicopters. This action requires a one-time visual inspection of the MGB lube system filter assembly for oil filter damage. This action also requires if either the primary or secondary oil filter is damaged, replacing both filters, all packings, and the studs before further flight. This action also requires replacing the oil filter bowl within 30 days after replacing a damaged filter and a daily inspection for an oil leak (no oil leaks allowed) during that 30-day interim period. This amendment is prompted by three reports of damaged oil filters or packings resulting from operating with an oversized packing possibly because of incorrect part numbers in the maintenance manual. Sikorsky has issued a temporary revision, T–Rev 63–19, to the maintenance manual to correct any errors. Installing the filter assembly with an oversized packing (also known as an O-ring) in the oil filter double bypass valve can produce excessive assembly and fatigue loads in the oil filter bowl or the mounting studs that secure the oil filter bowl to the MGB. Based on rig testing, these conditions can result in reduced fatigue life in the studs and the oil filter bowl. Based on information from a previous accident investigation, failure of the oil filter bowl or mounting studs can result in sudden and complete loss of oil from the MGB. This condition, if not corrected, could result in complete loss of oil from the MGB, failure of the MGB, and subsequent loss of control of the helicopter.

We have reviewed Sikorsky Alert Service Bulletin (ASB) No. 92–63–018, dated July 1, 2009, and No. 92–63–019, dated July 14, 2009. ASB No. 92–63–018 specifies a one-time visual inspection for a damaged oil filter element. ASB No. 92–63–019 specifies replacing the MGB filter bowl on those helicopters that have previously been found to have a damaged MGB oil filter. ASB No. 92–63–019 also requires a daily visual inspection of the MGB lube system filter assembly for oil leaks (no leaks allowed) until the oil filter bowl is replaced.

This unsafe condition is likely to exist or develop on other helicopters of the same type design. Therefore, this AD is being issued to prevent complete loss of oil from the MGB, failure of the MGB, and subsequent loss of control of the helicopter. This AD requires visually inspecting the oil filter for damage and replacing any filter, packings, and mounting studs before further flight if the filter is damaged. The AD also requires replacing the oil filter bowl within 30 days after a damaged filter has been replaced. Do the actions by following specified portions of the service bulletin described previously.

The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the controllability or structural integrity of the helicopter. Therefore, a one-time visual inspection of the oil filter within 7 days is required. If the visual inspection finds a damaged filter, replacing the damaged filter, packings, and filter bowl mounting studs before further flight are also required. Also, a one-time replacement of the oil filter bowl is required within 30 days after replacing a damaged oil filter. All of these are very short compliance times. Therefore, this AD must be issued immediately.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

We estimate that this AD will affect 44 helicopters. Assuming a one-time inspection shows no damage to 39 of the helicopters, it will take about 1.5 work hours to remove, inspect, and reinstall each oil filter assembly and packing for 39 helicopters. Assuming oil filter damage is discovered in 5 helicopters, the additional required actions will take about:

• 1.5 work hours to remove, inspect, and reinstall each filter assembly and packing, and

• 3 work hours to replace the mounting studs.

Assuming the bowl replacement is deferred on all 5 helicopters for 30 days, it will take about:

• 15 work hours for 30 daily (.5 work hour each) inspections for leakage, and

• 1 work hour to replace the oil filter bowl.

The average labor rate is $80 per work hour. Required parts will cost about $817 for the oil filter assembly, $81 for the filter bowl mounting studs, and $4,568 for the filter bowl per helicopter. Based on these figures, we estimate the total cost impact of the AD on U.S. operators to be $40,210.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any written data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2009–1130; Directorate Identifier 2009–SW–40–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of our docket Web site, you can find and read the comments to any of our dockets, including the name of the individual who sent the comment. You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Regulatory Findings

We have determined that this AD will not have federalism implications under

Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this AD. See the AD docket to examine the economic evaluation.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2009–25–10 Sikorsky Aircraft Corp.: Amendment 39–16130. Docket No. FAA–2009–1130; Directorate Identifier 2009–SW–40–AD.

Applicability: Model S–92A helicopters, serial numbers 920006 through 920109, certificated in any category.

Compliance: Required as indicated, unless done previously.

To prevent complete loss of oil from the main gearbox (MGB), failure of the MGB, and subsequent loss of control of the helicopter, do the following:

(a) Within 7 days, inspect the MGB lube system filter assembly for damage to the primary and secondary oil filters by following the Accomplishment Instructions, paragraphs 3.A.(4) and through 3.A.(6) of Sikorsky Alert Service Bulletin (ASB) No. 92–63–018, dated July 1, 2009 (ASB No. 92–63–018). For purposes of this AD, ''damage'' is the presence of those conditions described in paragraphs 3.A.(5) and 3.A.(8) of the Accomplishment Instructions of ASB No. 92–63–018.

(b) If you find damage in the primary oil filter element (part number (P/N) 70351–38801–102) as follows: ''wavy pleats'' as depicted in Figure 1, internal buckling or a crack as depicted in Figure 2, or indented dimples as depicted in Figure 3 of ASB No. 92–63–018 or damage in the secondary oil filter element (P/N 70351–38801–103) as follows: ''wavy pleats'' as depicted in Figure 4 or an elongated cup as depicted in Figure 5 of ASB No. 92–63–018, replace both the primary and secondary filters, packings, and filter bowl mounting studs, service the transmission and perform a functional test before further flight by following the Accomplishment Instructions, paragraphs 3.C.(1) through 3.C.(23), of ASB No. 92–63–018, except this AD does not require you to return removed studs to HSI nor does it require you to contact the manufacturer. If you find damage in the tapped holes or in the MGB housing lockring counterbore, contact the Boston Aircraft Certification Office for an approved repair.

(c) If you find no damage in the primary or secondary oil filter element, before further flight, replace the packings, service the transmission, and perform a functional test by following the Accomplishment Instructions, paragraphs 3.B.(1) through 3.B.(4) of ASB No. 92–63–018.

(d) For those helicopters on which the primary or secondary oil filter element and filter bowl mounting studs were replaced as required by paragraph (b) of this AD:

(1) Before the first flight of each day until the oil filter bowl, P/N AAC367–16D2A, is replaced, inspect the MGB lube system filter assembly for any oil leak.

(2) Before further flight after any oil leak is detected as required by paragraph (d)(1) of this AD or within 30 days, whichever is earlier, replace the oil filter bowl.

Note: Sikorsky ASB No. 92–63–019, dated July 1, 2009, pertains to the subject of this AD.

(e) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Boston Aircraft Certification Office, FAA, ATTN: Kirk Gustafson, Aviation Safety Engineer, Engine and Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803, telephone (781) 238–7190, fax (781) 238–7170, for information about previously approved alternative methods of compliance.

(f) The Joint Aircraft System/Component (JASC) Code is 6300: Main Rotor System.

(g) Inspecting and replacing the main gearbox lube system assembly parts shall be done by following the specified portions of Sikorsky Alert Service Bulletin (ASB) No. 92–63–018, dated July 1, 2009. The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Sikorsky Aircraft Corporation, Attn: Manager, Commercial Technical Support, mailstop s581a, 6900 Main Street, Stratford, CT, telephone (203) 383–4866, e-mail address *tsslibrary@sikorsky.com,* or at *http://www.sikorsky.com.* Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(h) This amendment becomes effective on December 21, 2009.

Issued in Fort Worth, Texas, on November 25, 2009.

Lance T. Gant,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. E9–28863 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0778; Directorate Identifier 2009–CE–040–AD; Amendment 39–16119; AD 2009–25–02]

RIN 2120–AA64

Airworthiness Directives; Twin Commander Aircraft LLC Models 690, 690A, and 690B Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Twin Commander Aircraft LLC Models 690, 690A, and 690B airplanes. This AD requires you to inspect between the surface of the left-hand (LH) and right-

hand (RH) upper wing skins and the engine mount beam support straps for any signs of corrosion, replace the upper steel straps with parts of improved design, and modify both wings. This AD results from reports that corrosion was found between the mating surfaces of the wing upper skin surface and the engine mount beam support straps. We are issuing this AD to detect and correct corrosion on the engine mount beam support straps and the upper wing skins, which could result in failure of the engine mount beam support straps. This failure could lead to loss of the engine and possible loss of control of the airplane.

DATES: This AD becomes effective on January 8, 2010.

On January 8, 2010, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: To get the service information identified in this AD, contact Twin Commander Aircraft LLC, 18933–59th Avenue, NE., Suite 115, Arlington, WA 98223, telephone: (360) 435–9797; fax: (360) 435–1112; Internet: *http://www.twincommander.com.*

To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov.* The docket number is FAA–2009–0778; Directorate Identifier 2009–CE–040–AD.

FOR FURTHER INFORMATION CONTACT: Vince Massey, Aerospace Engineer, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone: (425) 917–6475; fax: (425) 917–6590; e-mail: *vince.massey@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On August 21, 2009, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Twin Commander Aircraft LLC Models 690, 690A, and 690B airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 28, 2009 (74 FR 44308). The NPRM proposed to require you to inspect between the surface of the LH and RH upper wing skins and the engine mount beam support straps for any signs of corrosion, replace the upper steel straps with parts of improved design, and modify both wings.

Comments

We provided the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and FAA's response to each comment:

Comment Issue: Extend Compliance Time

Michael Curtis Pidek, William I. Smith, and Tom Bayer all state that with 275 airplanes affected by this AD and only 15 service centers available to do the actions required in this AD, there is not enough time to comply with the AD.

All three commenters request an extension of the compliance time to allow enough time for the service centers to schedule the work without grounding airplanes until the work can be done.

We do not agree with the commenters. Over 65 airplanes are already in compliance with this AD. We have consulted with Twin Commander Aircraft LLC and they have covered this issue with the service centers. The service centers know how much work is required since they have already done the work on over 65 of the affected airplanes. The service centers plan on using multiple teams to work on several airplanes at the same time. They have confirmed they can perform the actions required in this AD in the compliance time as proposed.

Part of the alternative method of compliance (AMOC) provisions of 14 CFR 39.19 is an extension of the compliance time provided a level of safety acceptable to the FAA is met. The FAA will review any AMOCs of this nature on a case-by-case basis. If we determine the proposal presents an acceptable level of safety, we will approve it as an AMOC to the AD.

We are not changing the final rule AD action based on these comments.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD will affect 275 airplanes in the U.S. registry.

We estimate the following costs to do the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
80 work-hours × $80 per hour = $6,400	Not applicable	$6,400	$1,760,000

We estimate the following costs to do any necessary repairs/replacements that will be required based on the results of the inspection. We have no way of determining the number of airplanes that may need this repair/replacement:

SHORT MODIFICATION—OPTION A *

Labor cost	Parts cost	Total cost per airplane per side
250 work-hours × $80 per hour = $20,000 per side	$9,170 per kit per side	$29,170

MIDDLE MODIFICATION—OPTION B *

Labor cost	Parts cost	Total cost per airplane per side
280 work-hours × $80 per hour = $22,400 per side	$9,170 per kit per side	$31,570

LONG MODIFICATION—OPTION C *

Labor cost	Parts cost	Total cost per airplane per side
320 work-hours × $80 per hour = $25,600 per side	$9,170 per kit per side	$34,770

Note: * Depending on airplane configuration, airplanes with rectangular plates will need the Plate and Hardware Kit (SB237–4) at $2,090 per side. Labor to install this kit is included in Options A, B, and C.

STRAP ONLY REPLACEMENT—OPTION D

Labor cost	Parts cost	Total cost per airplane per side
75 work-hours × $80 per hour = $6,000 per side	$6,190 per strap per side	$12,190

We estimate the following costs to do the installation of access holes:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
30 work-hours × $80 per hour = $2,400	$1,293	$3,693	$1,015,575

We estimate the following costs to do the wing fastener modification:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
8.5 work-hours × $80 per hour = $680	$250	$930	$255,750

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this AD.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2009–0778; Directorate Identifier 2009–CE–040–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator,

the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. FAA amends § 39.13 by adding a new AD to read as follows:

2009–25–02 Twin Commander Aircraft LLC: Amendment 39–16119; Docket No. FAA–2009–0778; Directorate Identifier 2009–CE–040–AD.

Effective Date

(a) This AD becomes effective on January 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the following airplane models and serial numbers that are certificated in any category:

Models	Serial Nos. (S/Ns)
690	All S/Ns
690A	All S/Ns except 11195 and 11279.
690B	All S/Ns except 11361, 11383, 11527, and 11536.

Unsafe Condition

(d) This AD results from reports that corrosion was found between the mating surfaces of the wing upper skin surface and the engine mount beam support straps. We are issuing this AD to detect and correct corrosion on the engine mount beam support straps and upper wing skins, which could result in failure of the engine mount beam support straps. This failure could lead to loss of the engine and possible loss of control of the airplane.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Inspect between the surface of the left-hand (LH) and right-hand (RH) upper wing skins and the engine mount beam support straps for any signs of corrosion and determine the extent of any corrosion found.	Within the next 150 hours time-in-service after January 8, 2010 (the effective date of this AD) or within the next 12 months after January 8, 2010 (the effective date of this AD), whichever occurs first.	Follow Twin Commander Aircraft LLC Alert Service Bulletin No. 237, dated May 13, 2005, pages 1 through 14.
(2) Install modification access holes in the LH and RH lower wing skins.	Before further flight after the inspection required in paragraph (e)(1) of this AD.	Follow the Accomplishment Instructions, steps 1 through 4 and 6 through 9, of Twin Commander Aircraft Corporation Custom Kit No. 150, dated July 8, 1994, as specified in Twin Commander Aircraft LLC Alert Service Bulletin No. 237, dated May 13, 2005.
(3) If corrosion damage is found during the inspection required in paragraph (e)(1) of this AD, perform necessary modification.	Before further flight after the inspection required in paragraph (e)(1) of this AD.	Follow Twin Commander Aircraft LLC Alert Service Bulletin No. 237, dated May 13, 2005, Part II, Options A, B, or C, on pages 15 through 29 and 31.
(4) If corrosion damage is not found during the inspection required in paragraph (e)(1) of this AD, do the upper steel strap replacements.	Before further flight after the inspection required in paragraph (e)(1) of this AD.	Follow Twin Commander Aircraft LLC Alert Service Bulletin No. 237, dated May 13, 2005, Part II, Option D, on pages 30 and 31.
(5) Install additional wing fasteners on the LH and RH wing.	Before further flight after the inspection required in paragraph (e)(1) of the AD.	Follow Gulfstream American Corporation Service Bulletin No. 182, dated March 2, 1981.

Note: Although not required by this AD, we highly recommend compliance with Twin Commander Aircraft Corporation Service Bulletin No. 217, Revision No. 1, dated May 26, 1993, Engine Nacelle Firewall Reinforcement; and Twin Commander Aircraft LLC Alert Service Bulletin No. 239, dated February 13, 2006, Outboard Flap—Inboard Hinge Inspection & Reinforcement.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Vince Massey, Aerospace Engineer, FAA, Seattle ACO, 1601 Lind Avenue, SW, Renton, Washington 98057–3356; telephone: (425) 917–6475; fax: (425) 917–6590; email: *vince.massey@faa.gov*. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(g) You must use Twin Commander Aircraft LLC Alert Service Bulletin No. 237, dated May 13, 2005; Twin Commander Aircraft Corporation Custom Kit No. 150, dated July 8, 1994; and Gulfstream American Corporation Service Bulletin No. 182, dated March 2, 1981, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Twin Commander Aircraft LLC, 18933—59th Avenue, NE., Arlington, WA 98223, telephone: (360) 435–9797; fax: (360) 435–1112; Internet: *http://www.twincommander.com.*

(3) You may review copies of the service information incorporated by reference for this AD at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the Central Region, call (816) 329–3768.

(4) You may also review copies of the service information incorporated by reference for this AD at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on November 20, 2009.

Margaret Kline,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28548 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1074; Directorate Identifier 2009–NM–177–AD; Amendment 39–16106; AD 2008–17–01 R1]

RIN 2120–AA64

Airworthiness Directives; 328 Support Services GmbH (Dornier) Model 328–100 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: The FAA is revising an existing airworthiness directive (AD), which applies to all 328 Support Services GmbH (Dornier) Model 328–100 airplanes. That AD currently requires modifying the electrical wiring of the fuel pumps; installing insulation at the hand flow control and shut-off valves, and other components of the environmental control system; and installing markings at fuel wiring harnesses. That AD also requires revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness to incorporate new inspections of the fuel tank system. This AD clarifies the intended effect of the AD on spare and on-airplane fuel tank system components. This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

DATES: This AD is effective December 21, 2009.

On September 17, 2008 (73 FR 47027, August 13, 2008), the Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD.

On July 29, 2005 (70 FR 36470, June 24, 2005), the Director of the Federal Register approved the incorporation by reference of certain other publications listed in the AD.

We must receive any comments on this AD by January 19, 2010.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact 328 Support Services GmbH, Global Support Center, P.O. Box 1252, D–82231 Wessling, Federal Republic of Germany; telephone +49 8153 88111 6666; fax +49 8153 88111 6565; e-mail *gsc.op@328support.de;* Internet *http://www.328support.de.*

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Groves, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1503; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

On July 29, 2008, we issued AD 2008–17–01, Amendment 39–15639 (73 FR 47027, August 13, 2008). That AD applied to all 328 Support Services GmbH (Dornier) Model 328–100 airplanes. That AD required modifying the electrical wiring of the hand fuel pumps; installing insulation at the hand flow control and shut-off valves, and other components of the environmental control system; and installing markings at fuel wiring harnesses. That AD also required revising the Airworthiness Limitations section (ALS) of the Instructions for Continued Airworthiness to incorporate new inspections of the fuel tank system.

Critical design configuration control limitations (CDCCLs) are limitation requirements to preserve a critical ignition source prevention feature of the fuel tank system design that is necessary to prevent the occurrence of an unsafe condition. The purpose of a CDCCL is to provide instruction to retain the critical ignition source prevention feature during configuration change that may be caused by alterations, repairs, or maintenance actions. A CDCCL is not a periodic inspection.

Actions Since AD Was Issued

Since we issued that AD, we have determined that it is necessary to clarify the AD's intended effect on spare and on-airplane fuel tank system components, regarding the use of maintenance manuals and instructions for continued airworthiness.

Section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)) specifies the following:

> No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitation section unless the mandatory * * * procedures * * * have been complied with.

Some operators have questioned whether existing components affected by the new CDCCLs must be reworked. We did not intend for the AD to retroactively require rework of components that had been maintained using acceptable methods before the effective date of the AD. Owners and operators of the affected airplanes therefore are not required to rework affected components identified as airworthy or installed on the affected airplanes before the required revisions of the ALS. But once the CDCCLs are incorporated into the ALS, future maintenance actions on components must be done in accordance with those CDCCLs.

FAA's Determination and Requirements of This AD

The affected products have been approved by the aviation authority of another country, and are approved for operation in the United States. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This new AD retains the requirements of the existing AD, and adds a new note to clarify the intended effect of the AD on spare and on-airplane fuel tank system components.

Costs of Compliance

This revision imposes no additional economic burden. The current costs for this AD are repeated for the convenience of affected operators, as follows:

This AD affects about 16 airplanes of U.S. registry. The actions that are required by AD 2005–13–24 and

retained in this AD take about 70 work hours per airplane, at an average labor rate of $80 per work hour. Required parts cost about $14,118 per airplane. Based on these figures, the estimated cost of the currently required actions is $315,488, or $19,718 per airplane.

The ALS revision required by AD 2008–17–01 and retained in this AD takes about 1 work hour per airplane. Based on these figures, the estimated cost of this action specified in this AD for U.S. operators is $1,280, or $80 per airplane.

FAA's Justification and Determination of the Effective Date

This revision merely clarifies the intended effect on spare and on-airplane fuel tank system components, and makes no substantive change to the AD's requirements. For this reason, it is found that notice and opportunity for prior public comment for this action are unnecessary, and good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–1074; Directorate Identifier 2009–NM–177–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–15639 (73 FR 47027, August 13, 2008) and adding the following new AD:

2008–17–01 R1 328 Support Services GMBH (Formerly, AvCraft Aerospace GmbH, formerly Fairchild Dornier GmbH, formerly Dornier Luftfahrt GmbH): Amendment 39–16106. Docket No. FAA–2009–1074; Directorate Identifier 2009–NM–177–AD.

Effective Date

(a) This airworthiness directive (AD) is effective December 21, 2009.

Affected ADs

(b) This AD revises AD 2008–17–01, Amendment 39–15639.

Applicability

(c) This AD applies to all 328 Support Services GmbH (Dornier) Model 328–100 airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Note 1: This AD requires revisions to certain operator maintenance documents to include inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (j) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Restatement of Requirements of AD 2005–13–24, With No Changes

Modification and Installations

(f) Within 12 months after July 29, 2005 (the effective date of AD 2005–13–24), do the actions in Table 1 of this AD in accordance with the Accomplishment Instructions of AvCraft Service Bulletin SB–328–00–445, dated August 23, 2004; or Revision 1, dated June 17, 2005.

TABLE 1—REQUIREMENTS

Do the following actions—	By accomplishing all the actions specified in—
(1) Modify the electrical wiring of the left-hand and right-hand fuel pumps.	Paragraph 2.B(1) of AvCraft Service Bulletin SB–328–00–445, dated August 23, 2004; or Revision 1, dated June 17, 2005.
(2) Install insulation at the left-hand and right-hand flow control and shut-off valves, and other components of the environmental control system.	Paragraph 2.B(2) of AvCraft Service Bulletin SB–328–00–445, dated August 23, 2004; or Revision 1, dated June 17, 2005.
(3) Install markings at fuel wiring harnesses	Paragraph 2.B(3) of AvCraft Service Bulletin SB–328–00–445, dated August 23, 2004; or Revision 1, dated June 17, 2005.

Revision to Airworthiness Limitations

(g) Within 12 months after July 29, 2005, revise the Airworthiness Limitations section (ALS) of the Instructions for Continued Airworthiness by inserting a copy of Dornier Temporary Revision ALD–080, dated October 15, 2003, into the Dornier 328 Airworthiness Limitations Document. Thereafter, except as provided in paragraphs (i) and (j) of this AD, no alternative inspection intervals may be approved for this fuel tank system.

Restatement of Requirements of AD 2008–17–01, With No Changes

Revised Initial Compliance Time

(h) For Tasks 28–00–00–02 and 28–00–00–03 (''Detailed Inspection of Outer Fuel Tank Harness Internal, LH/RH,'' and ''Detailed Inspection of Inner Fuel Tank Harness Internal, LH/RH''), as identified in Dornier Temporary Revision ALD–080, dated October 15, 2003, or Section F, ''Fuel Tank System Limitations,'' of the Dornier 328 Airworthiness Limitations Document (ALD), Revision 15, dated January 15, 2005; the initial compliance time is within 8 years after September 17, 2008 (the effective date of AD 2008–17–01). Thereafter, except as provided by paragraphs (i) and (j) of this AD, these tasks must be accomplished at the repetitive interval specified in Section F, ''Fuel Tank System Limitations,'' of the Dornier 328 ALD, Revision 15, dated January 15, 2005.

No Alternative Inspections, Inspection Intervals, or Critical Design Configuration Control Limitations (CDCCLs)

(i) After accomplishing the actions specified in paragraphs (g) and (h) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (j) of this AD.

New Information

Explanation of CDCCL Requirements

Note 2: Notwithstanding any other maintenance or operational requirements, components that have been identified as airworthy or installed on the affected airplanes before the revision of the ALS, as required by paragraph (g) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the ALS has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

Alternative Methods of Compliance (AMOCs)

(j) The Manager, ANM–116, International Branch, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Groves, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1503; fax (425) 425–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Related Information

(k) European Aviation Safety Agency Airworthiness Directive 2006–0197 [Corrected], dated July 11, 2006, also addresses the subject of this AD.

Material Incorporated by Reference

(l) You must use the service information contained in Table 2 of this AD, as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

TABLE 2—MATERIAL INCORPORATED BY REFERENCE

Service information	Revision level	Date
AvCraft Service Bulletin SB-328–00–445, including Price Information Sheet	Original	August 23, 2004.
AvCraft Service Bulletin SB-328–00–445	1	June 17, 2005.
Dornier Temporary Revision ALD–080	Original	October 15, 2003.
Section F, ''Fuel Tank System Limitations,'' of Dornier 328 Airworthiness Limitations Document.	15	January 15, 2005.

(1) The Director of the Federal Register previously approved the incorporation by reference of AvCraft Service Bulletin SB–328–00–445, Revision 1, dated June 17, 2005; and Section F, ''Fuel Tank System Limitations,'' of Dornier 328 Airworthiness Limitations Document, Revision 15, dated January 15, 2005 on September 17, 2008 (73 FR 47027, August 13, 2008).

(2) The Director of the Federal Register previously approved the incorporation by reference of AvCraft Service Bulletin SB–328–00–445, including Price Information Sheet, dated August 23, 2004; and Dornier Temporary Revision ALD–080, dated October 15, 2003; on July 29, 2005 (70 FR 36470, June 24, 2005).

(3) For service information identified in this AD, contact 328 Support Services GmbH, Global Support Center, P.O. Box 1252, D–82231 Wessling, Federal Republic of Germany; telephone +49 8153 88111 6666; fax +49 8153 88111 6565; e-mail *gsc.op@328support.de;* Internet *http://www.328support.de.*

(4) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(5) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on November 18, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28299 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0719; Directorate Identifier 2009–NM–078–AD; Amendment 39–16116; AD 2009–24–22]

RIN 2120–AA64

Airworthiness Directives; Learjet Inc. Model 45 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Learjet Model 45 airplanes. This AD requires inspecting the baggage bay door fire barrier seal for inconel mesh in the fire barrier seal material; for certain airplanes, inspecting the fiberglass doublers for presence of red Room Temperature Vulcanizing (RTV) sealant; and doing related investigative and corrective actions if necessary. This AD results from reports of incorrect external baggage door seal material and door seal sealant, as well as incorrect sealant on interior baggage panels used during manufacture of the airplane. We are issuing this AD to prevent the use of door seals and sealant that do not meet flammability requirements, which could result in an uncontrollable and undetected fire within the baggage compartment.

DATES: This AD is effective January 8, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of January 8, 2010.

ADDRESSES: For service information identified in this AD, contact Learjet, Inc., One Learjet Way, Wichita, Kansas 67209–2942; telephone 316–946–2000; fax 316–946–2220; e-mail *ac.ict@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: William Griffith, Aerospace Engineer, Airframe Branch, ACE–118W, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4116; fax (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Learjet Inc. Model 45 airplanes. That NPRM was published in the **Federal Register** on August 27, 2009 (74 FR 43645). That NPRM proposed to require inspecting the baggage bay door fire barrier seal for inconel mesh in the fire barrier seal material; for certain airplanes, inspecting the fiberglass doublers for presence of red Room Temperature Vulcanizing (RTV) sealant; and doing related investigative and corrective actions if necessary.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD affects 256 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost per product	Number of U.S.-registered airplanes	Fleet cost
Inspection and modification of red RTV sealant ..	10	$80	$800	Up to 256	Up to $204,800.
Inspection and modification of fire barrier seal	6	80	480	Up to 256	Up to $122,880.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979), and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2009–24–22 Learjet Inc. (Formerly Gates Learjet Corporation): Amendment 39–16116. Docket No. FAA–2009–0719; Directorate Identifier 2009–NM–078–AD.

Effective Date

(a) This airworthiness directive (AD) is effective January 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Learjet Inc. Model 45 airplanes, certificated in any category, serial numbers 45–005 through 45–321 inclusive, 45–323 through 45–332 inclusive, and 45–2001 through 45–2075 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 52: Doors, and ATA Code 25: Equipment/Furnishings.

Unsafe Condition

(e) This AD results from reports of incorrect external baggage door seal material and door seal sealant, as well as incorrect sealant on interior baggage panels used during manufacture of the airplane. The Federal Aviation Administration is issuing this AD to prevent the use of door seals and sealant that do not meet flammability requirements, which could result in an uncontrollable and undetected fire within the baggage compartment.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection of Red Room Temperature Vulcanizing (RTV) Sealant in Aft Baggage Bay

(g) For airplanes having serial numbers 45–005 through 45–314 inclusive and 45–2001 through 45–2065 inclusive: Within 300 flight hours after the effective date of this AD, do a general visual inspection of the outer surfaces of the fiberglass doublers for the presence of red RTV sealant, in accordance with the Accomplishment Instructions in Bombardier Service Bulletin 45–25–21, Revision 1, dated January 19, 2009; or 40–25–11, Revision 1, dated January 19, 2009; as applicable. If any red RTV sealant is found, before further flight, replace the sealant, in accordance with the Accomplishment Instructions in Bombardier Service Bulletin 45–25–21, Revision 1, dated January 19, 2009; or 40–25–11, Revision 1, dated January 19, 2009; as applicable.

Note 1: For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Inspection of Baggage Bay Door Fire Barrier Seal

(h) For all airplanes: Within 300 flight hours after the effective date of this AD, do a general visual inspection of the baggage bay door fire barrier seal for the presence of metal inconel mesh in the material, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions in Bombardier Service Bulletin 45–52–16, Revision 1, dated July 21, 2008; or 40–52–07, Revision 1, dated July 21, 2008; as applicable. Do all applicable related investigative and corrective actions before further flight in accordance with the Accomplishment Instructions in Bombardier Service Bulletin 45–52–16, Revision 1, dated July 21, 2008; or 40–52–07, Revision 1, dated July 21, 2008; as applicable.

Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: William Griffith, Aerospace Engineer, Airframe Branch, ACE–118W, FAA, Wichita ACO, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4116; fax (316) 946–4107.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Material Incorporated by Reference

(j) You must use the service information contained in Table 1 of this AD to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Learjet, Inc., One Learjet Way, Wichita, Kansas 67209–2942; telephone 316–946–2000; fax 316–946–2220; e-mail *ac.ict@aero.bombardier.com*; Internet *http://www.bombardier.com*.

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

TABLE 1—MATERIAL INCORPORATED BY REFERENCE

Service bulletin	Revision	Date
Bombardier Service Bulletin 40–25–11	1	January 19, 2009.
Bombardier Service Bulletin 45–25–21.	1	January 19, 2009.
Bombardier Service Bulletin 40–52–07.	1	July 21, 2008.
Bombardier Service Bulletin 45–52–16.	1	July 21, 2008.

Issued in Renton, Washington, on November 19, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28550 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0784; Directorate Identifier 2009–NM–109–AD; Amendment 39–16124; AD 2009–25–05]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–400 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Several operators have reported cases of inadvertent single spoiler deployment during flight on the DHC–8 Series 400 aircraft. Investigation has revealed that the probable cause for this deployment is internal contamination of the Lift/Dump (L/D) valve and moisture ingress into the L/D valve armature.

This condition, if not corrected, could cause uncommanded deployment of the spoilers resulting in increased drag and in combination with a loss of aileron, could result in a significant reduction in aircraft roll control.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 8, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 8, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 4, 2009 (74 FR 45783). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Several operators have reported cases of inadvertent single spoiler deployment during flight on the DHC–8 Series 400 aircraft. Investigation has revealed that the probable cause for this deployment is internal contamination of the Lift/Dump (L/D) valve and moisture ingress into the L/D valve armature.

This condition, if not corrected, could cause uncommanded deployment of the spoilers resulting in increased drag and in combination with a loss of aileron, could result in a significant reduction in aircraft roll control.

Corrective actions include incorporating a modification to add a filter/restrictor fitting to the spoiler lift dump valve, which includes upgrading, testing, and re-identifying the valve after replacing the pressure port inlet fitting. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Change to Corrective Action Statement

We have added information to the corrective action statement in the preamble and paragraph (e) of the AD for clarity.

Change to Alternative Methods of Compliance (AMOC) Paragraph

We have updated paragraph (g)(1) of this AD to provide the appropriate contact information to use when submitting requests for approval of an AMOC.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD with the changes described previously. We also determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect about 61 products of U.S. registry. We also estimate that it will take about 6 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these

figures, we estimate the cost of this AD to the U.S. operators to be $29,280, or $480 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2009–25–05 Bombardier, Inc. (Formerly de Havilland, Inc.): Amendment 39–16124. Docket No. FAA–2009–0784; Directorate Identifier 2009–NM–109–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model DHC–8–400, DHC–8–401, and DHC–8–402 series airplanes, certificated in any category, serial numbers 4001 through 4237 inclusive.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

''Several operators have reported cases of inadvertent single spoiler deployment during flight on the DHC–8 Series 400 aircraft. Investigation has revealed that the probable cause for this deployment is internal contamination of the Lift/Dump (L/D) valve and moisture ingress into the L/D valve armature.

''This condition, if not corrected, could cause uncommanded deployment of the spoilers resulting in increased drag and in combination with a loss of aileron, could result in a significant reduction in aircraft roll control.''

Corrective actions include incorporating a modification to add a filter/restrictor fitting to the spoiler lift dump valve, which includes upgrading, testing, and re-identifying the valve after replacing the pressure port inlet fitting.

Actions and Compliance

(f) Unless already done, within 5,000 flight hours after the effective date of this AD, incorporate Bombardier Modsum 4–113554 to add a filter/restrictor fitting to the spoiler lift dump valve, in accordance with Bombardier Service Bulletin 84–27–43, dated January 29, 2009.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7300; fax (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Canadian Airworthiness Directive CF–2009–26, dated May 21, 2009; and Bombardier Service Bulletin 84–27–43, dated January 29, 2009; for related information.

Material Incorporated by Reference

(i) You must use Bombardier Service Bulletin 84–27–43, dated January 29, 2009, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by

reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on November 23, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28798 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0055; Directorate Identifier 2008–NM–194–AD; Amendment 39–16125; AD 2009–25–06]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B2–1C, A300 B2–203, A300 B2K–3C, A300 B4–103, A300 B4–203, and A300 B4–2C Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

* * * [T]he FAA has published SFAR 88 (Special Federal Aviation Regulation 88). * * * Under this regulation, all holders of type certificates for passenger transport aeroplane * * * are required to conduct a design review against explosion risks.

One of the consequences of the Airbus design review is the modification of the fuel pump wiring to provide protection against chafing of the fuel pump cables. This condition, if not corrected, could generate short circuits leading to fuel pump failure and arcing. These could become a potential ignition source inside the fuel tank which, in combination with flammable fuel vapours (if present), could result in a fuel tank explosion and consequent loss of the aeroplane.

To address this unsafe condition, EASA [European Aviation Safety Agency] issued AD 2007–0066 that required this modification [of the fuel pump against short circuit] in accordance with Airbus Service Bulletin (SB) A300–24–0103 Revision 01. Airbus subsequently introduced an additional modification of the electrical wiring of the outer fuel pump and the landing lights of the left (LH) and the right (RH) side in Revision 02 of the SB A300–24–0103, leading to the issuance of EASA AD 2008–0188 which superseded EASA AD 2007–0066 and required the additional work.

More recently, Airbus introduced some additional protection to routes 1P and 2P harnesses in zone 571 and 671 of the aeroplane.

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 8, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 8, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That supplemental NPRM was published in the **Federal Register** on July 6, 2009 (74 FR 31896), and proposed to supersede AD 2007–18–02, Amendment 39–15182 (72 FR 49175, August 28, 2007). That supplemental NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Further to the accident of a Boeing 747–131 (flight TWA800), the FAA has published SFAR 88 (Special Federal Aviation Regulation 88). Subsequently, the Joint Aviation Authorities (JAA) recommended the application of a similar regulation to the National Aviation Authorities (NAA) of its member countries. Under this regulation, all holders of type certificates for passenger transport aeroplane with either a passenger capacity of 30 or more, or a payload capacity of 3,402 kg (7,500 lbs) or more which have received their certification after 01 January 1958, are required to conduct a design review against explosion risks.

One of the consequences of the Airbus design review is the modification of the fuel pump wiring to provide protection against chafing of the fuel pump cables. This condition, if not corrected, could generate short circuits leading to fuel pump failure and arcing. These could become a potential ignition source inside the fuel tank which, in combination with flammable fuel vapours (if present), could result in a fuel tank explosion and consequent loss of the aeroplane.

To address this unsafe condition, EASA [European Aviation Safety Agency] issued AD 2007–0066 that required this modification in accordance with Airbus Service Bulletin (SB) A300–24–0103 Revision 01. Airbus subsequently introduced an additional modification of the electrical wiring of the outer fuel pump and the landing lights of the left (LH) and the right (RH) side in Revision 02 of the SB A300–24–0103, leading to the issuance of EASA AD 2008–0188 which superseded EASA AD 2007–0066 and required the additional work.

More recently, Airbus introduced some additional protection to routes 1P and 2P harnesses in zone 571 and 671 of the aeroplane.

For the reason described above, this new AD retains the requirements of EASA AD 2008–0188, which is superseded, and requires the additional work as specified in Revision 03 of Airbus SB A300–24–0103.

The additional modification will provide additional protection from chafing and will prevent intermittent operation of the fuel pump and landing lights, as well as failure of the power supply. The modification of the wiring of the outer fuel pump and the landing light on the LH side route 1P harness and RH side route 2P harness includes additional mechanical protection that includes procedures for installing new splicing on the wires, a new cable type, shrink sleeve installation on the new wiring, and an additional braided conduit sleeve (Halar), as applicable, for the fuel pumps and the landing lights. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received.

Request To Refer to Updated MCAI

Airbus requests that we refer to the latest EASA AD 2009–0157, dated July 17, 2009 (which was issued after the FAA supplemental NPRM was published), to require the additional work provided in Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009. The supplemental NPRM referred to Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009, as the appropriate source of service information for the required actions. Airbus further requests that we review the supplemental NPRM in light of the new EASA AD to qualify current requirements depending on the

airplane configuration, as specified in the latest EASA AD.

We agree to refer to the latest EASA AD because it refers to the revised service information. However, we do not agree that it is necessary to revise the supplemental NPRM to qualify the requirements based on different configurations. Paragraph (g) of this AD requires that work be accomplished in accordance with Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009. The service bulletin specifies the different configurations and corresponding actions so there is no need to change the AD. Therefore, we have not changed the AD in regard to this issue.

Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect about 13 products of U.S. registry.

The actions that are required by AD 2007–18–02 and retained in this AD take about 72 work-hours per product, at an average labor rate of $80 per work hour. Required parts cost about $5,050 per product. Based on these figures, the estimated cost of the currently required actions is $10,810 per product.

We estimate that it will take about 42 work-hours per product to comply with the new basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $4,100 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $96,980, or $7,460 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–15182 (72 FR 49175, August 28, 2007) and adding the following new AD:

2009–25–06 Airbus: Amendment 39–16125. Docket No. FAA–2009–0055; Directorate Identifier 2008–NM–194–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 8, 2010.

Affected ADs

(b) This AD supersedes AD 2007–18–02, Amendment 39–15182.

Applicability

(c) This AD applies to Airbus Model A300 B2–1C, A300 B2–203, A300 B2K–3C, A300 B4–103, A300 B4–203, and A300 B4–2C airplanes, certificated in any category, as identified in Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical power.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Further to the accident of a Boeing 747–131 (flight TWA800), the FAA has published SFAR 88 (Special Federal Aviation Regulation 88). Subsequently, the Joint Aviation Authorities (JAA) recommended the application of a similar regulation to the National Aviation Authorities (NAA) of its member countries. Under this regulation, all holders of type certificates for passenger transport aeroplane with either a passenger capacity of 30 or more, or a payload capacity of 3 402 kg (7,500 lbs) or more which have received their certification after 01 January 1958, are required to conduct a design review against explosion risks.

One of the consequences of the Airbus design review is the modification of the fuel

pump wiring to provide protection against chafing of the fuel pump cables. This condition, if not corrected, could generate short circuits leading to fuel pump failure and arcing. These could become a potential ignition source inside the fuel tank which, in combination with flammable fuel vapours (if present), could result in a fuel tank explosion and consequent loss of the aeroplane.

To address this unsafe condition, EASA [European Aviation Safety Agency] issued AD 2007–0066 that required this modification in accordance with Airbus Service Bulletin (SB) A300–24–0103 Revision 01. Airbus subsequently introduced an additional modification of the electrical wiring of the outer fuel pump and the landing lights of the left (LH) and the right (RH) side in Revision 02 of the SB A300–24–0103, leading to the issuance of EASA AD 2008–0188 which superseded EASA AD 2007–0066 and required the additional work.

More recently, Airbus introduced some additional protection to routes 1P and 2P harnesses in zone 571 and 671 of the aeroplane.

For the reason described above, this new AD retains the requirements of EASA AD 2008–0188, which is superseded, and requires the additional work as specified in Revision 03 of Airbus SB A300–24–0103.

The additional modification will provide additional protection from chafing and will prevent intermittent operation of the fuel pump and landing lights, as well as failure of the power supply. The modification of the wiring of the outer fuel pump and the landing light on the LH side route 1P harness and RH side route 2P harness includes additional mechanical protection that includes procedures for installing new splicing on the wires, a new cable type, shrink sleeve installation on the new wiring, and an additional braided conduit sleeve (Halar), as applicable, for the fuel pumps and the landing lights.

Restatement of Requirements of AD 2007–18–02, With Revised Service Information

(f) Within 31 months after October 2, 2007 (the effective date of AD 2007–18–02), unless already done, modify the inner and outer fuel pump wiring, route 1P and 2P harnesses in the LH (left-hand) wing and in the RH (right-hand) wing, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–24–0103, Revision 01, dated January 11, 2007; or Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009. After the effective date of this AD, use only Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009. Actions done before October 2, 2007, in accordance with Airbus Service Bulletin A300–24–0103, dated March 15, 2006, for airplanes under configuration 1 as defined in Airbus Service Bulletin A300–24–0103, Revision 01, dated January 11, 2007; Revision 02, dated April 4, 2008; or Revision 03, dated February 18, 2009; are acceptable for compliance with the requirements of this paragraph.

New Requirements of This AD

Actions and Compliance

(g) Unless already done, within 12 months after the effective date of this AD, modify the wiring of the outer fuel pump and the landing light on the LH side route 1P harness and RH side route 2P harness in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO. AMOCs approved previously in accordance with AD 2007–18–02, are approved as AMOCs for the corresponding provisions of this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(i) Refer to MCAI EASA Airworthiness Directive 2009–0157, dated July 17, 2009; Airbus Service Bulletin A300–24–0103, Revision 01, dated January 11, 2007; and Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009; for related information.

Material Incorporated by Reference

(j) You must use Airbus Mandatory Service Bulletin A300–24–0103, Revision 03, dated February 18, 2009, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com*; Internet *http://www.airbus.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on November 23, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28797 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0658; Directorate Identifier 2009–NM–058–AD; Amendment 39–16115; AD 2009–24–21]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–14, DC–9–15, and DC–9–15F Airplanes; and McDonnell Douglas Model DC–9–20, DC–9–30, DC–9–40, and DC–9–50 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) that applies to all McDonnell Douglas Model DC–9–14, DC–9–15, and DC–9–15F airplanes; and McDonnell Douglas Model DC–9–20, DC–9–30, DC–9–40, and DC–9–50 series airplanes. That AD currently requires repetitive inspections for cracks of the main landing gear (MLG) shock strut cylinder, and related investigative and corrective actions if necessary. This AD adds more work on airplanes that have main landing gear shock struts with certain identified part numbers. This AD results from two reports of a collapsed MLG and a report of cracks in two MLG cylinders. We are

issuing this AD to detect and correct fatigue cracks in the shock strut cylinder of the MLG, which could result in a collapsed MLG during takeoff or landing, and possible reduced structural integrity of the airplane.

DATES: This AD becomes effective January 8, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of January 8, 2010.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Wahib Mina, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5324; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2005–19–08, amendment 39–14273 (70 FR 54616, September 16, 2005). The existing AD applies to all McDonnell Douglas Model DC–9–14, DC–9–15, and DC–9–15F airplanes; and Model DC–9–20, DC–9–30, DC–9–40, and DC–9–50 series airplanes. That NPRM was published in the **Federal Register** on July 30, 2009 (74 FR 37963). That NPRM proposed to continue to require repetitive inspections for cracks of the main landing gear (MLG) shock strut cylinder, and related investigative and corrective actions if necessary. That NPRM also proposed to require more work on airplanes that have main landing gear shock struts with certain identified part numbers.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been received on the NPRM or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

There are about 644 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspection	4 to 6	$80	None	$320 to $480 per inspection cycle.	426	$136,320 to $204,480 per inspection cycle.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14273 (70 FR 54616, September 16, 2005) and by

adding the following new airworthiness directive (AD):

2009–24–21 McDonnell Douglas: Amendment 39–16115. Docket No. FAA–2009–0658; Directorate Identifier 2009–NM–058–AD.

Effective Date

(a) This AD becomes effective January 8, 2010.

Affected ADs

(b) This AD supersedes AD 2005–19–08.

Applicability

(c) This AD applies to all McDonnell Douglas Model DC–9–14, DC–9–15, and DC–9–15F airplanes; Model DC–9–21 airplanes; Model DC–9–31, DC–9–32, DC–9–32 (VC–9C), DC–9–32F, DC–9–33F, DC–9–34, DC–9–34F, and DC–9–32F (C–9A, C–9B) airplanes; Model DC–9–41 airplanes; and Model DC–9–51 airplanes; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 32: Landing gear.

Unsafe Condition

(e) This AD results from two reports of a collapsed main landing gear (MLG) and a report of cracks in two MLG cylinders. We are issuing this AD to detect and correct fatigue cracks in the shock strut cylinder of the MLG, which could result in a collapsed MLG during takeoff or landing, and possible reduced structural integrity of the airplane.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Restatement of Requirements of AD 2005–19–08, With Revised Service Information

Records Review

(g) Except as required by paragraph (m) of this AD, before the applicable compliance time specified in paragraph (h) or Table 1 of this AD, as applicable, do the applicable actions in paragraphs (g)(1) and (g)(2) of this AD.

(1) For all airplane groups: Review the airplane maintenance records of the MLG to determine its service history and the number of landings on the MLG shock strut cylinder.

(2) For Group 3 airplanes identified in the service bulletin: Review the maintenance records to determine if the MLG cylinder on each Group 3 airplane has always been on a Group 3 airplane, and do the actions in paragraph (k) of this AD.

Inspection

(h) Inspect the MLG shock strut cylinders for cracks using the Option 1 or Option 2 non-destructive testing inspection described in Boeing Alert Service Bulletin DC9–32A350, Revision 1, dated August 3, 2005; or Revision 2, dated March 20, 2009; except as required by paragraph (m) of this AD. Inspect in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin DC9–32A350, Revision 1, dated August 3, 2005; or Revision 2, dated March 20, 2009; except as required by paragraph (m) of this AD. After the effective date of this AD, use only Boeing Alert Service Bulletin DC9–32A350, Revision 2, dated March 20, 2009. Do the detailed inspection before the accumulation of 60,000 total landings on the MLG, or at the applicable grace period specified in Table 1 of this AD, whichever occurs later, except as required by paragraph (m) of this AD, and except as provided by paragraph (k) of this AD. If the review of maintenance records is not sufficient to conclusively determine the service history and number of landings on the MLG shock strut cylinder, perform the initial inspection at the applicable grace period specified in Table 1 of this AD.

TABLE 1—THRESHOLD AND REPETITIVE INTERVAL

Airplanes identified in the Service Bulletin as Group	Threshold	Repetitive interval
1	Within 18 months or 650 landings after October 21, 2005 (the effective date of AD 2005–19–08), whichever occurs first.	Intervals not to exceed 650 landings.
2	Within 18 months or 500 landings after October 21, 2005, whichever occurs first.	Intervals not to exceed 500 landings.
3, except as provided by paragraph (k) of this AD.	Within 18 months or 2,500 landings after October 21, 2005, whichever occurs first.	Intervals not to exceed 2,500 landings.
4	Within 18 months or 2,100 landings after October 21, 2005, whichever occurs first.	Intervals not to exceed 2,100 landings.

No Indication of Cracking Is Found

(i) If no indication of cracking is found during the inspection required by paragraph (h) of this AD, repeat the inspection in accordance with Boeing Alert Service Bulletin DC9–32A350, Revision 1, dated August 3, 2005; or Boeing Alert Service Bulletin DC9–32A350, Revision 2, dated March 20, 2009; at the applicable interval specified in Table 1 of this AD, except as required by paragraph (m) of this AD. After the effective date of this AD, use only Boeing Alert Service Bulletin DC9–32A350, Revision 2, dated March 20, 2009.

Related Investigative and Corrective Actions

(j) If any indication of cracking is found during any inspection required by paragraph (h) or (i) of this AD: Before further flight, confirm the indication of cracking by doing all applicable related investigative actions and doing the applicable corrective actions in accordance with Boeing Alert Service Bulletin DC9–32A350, Revision 1, dated August 3, 2005; or Revision 2, dated March 20, 2009; except as required by paragraph (m) of this AD. After the effective date of this AD, use only Boeing Alert Service Bulletin DC9–32A350, Revision 2, dated March 20, 2009. Repeat the inspection at the applicable threshold and interval specified in paragraph (h) of this AD.

MLG Cylinder Previously Installed on Group 4 Airplanes

(k) For MLG cylinders on Group 3 airplanes as identified in Boeing Alert Service Bulletin DC9–32A350, Revision 1, dated August 3, 2005; or Revision 2, dated March 20, 2009: If the MLG cylinder was previously installed on a Group 4 airplane, as identified in Boeing Alert Service Bulletin DC9–32A350, Revision 1, dated August 3, 2005; or Revision 2, dated March 20, 2009; or if the service history and number of landings cannot be determined, the MLG cylinder must be inspected at the grace period and repetitive interval that applies to Group 4 airplanes, as specified in Table 1 of this AD, except as required by paragraph (m) of this AD.

Actions Accomplished in Accordance With Original Issue of Service Bulletin

(l) For airplanes with shock struts that have part numbers other than 5924400–505 and 5924400–506: Actions done before the effective date of this AD in accordance with Boeing Alert Service Bulletin DC9–32A350, dated December 3, 2004, are acceptable for compliance with the corresponding actions required by paragraphs (h), (i), (j), and (k) of this by this AD.

New Requirements of This AD

(m) For airplanes with shock struts that have part numbers 5924400–505 and 5924400–506: Do the actions required by paragraphs (g), (h), (i), (j), and (k), as applicable, in accordance with Boeing Alert Service Bulletin DC9–32A350, Revision 2, dated March 20, 2009. Do the actions at the time specified in those paragraphs, except where Table 1 of this AD specifies a compliance time after October 21, 2005, the compliance time for these airplanes is within the specified compliance time after the effective date of this AD.

Alternative Methods of Compliance (AMOCs)

(n)(1) The Manager, Los Angeles Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested

using the procedures found in 14 CFR 39.19. Send information to ATTN: Wahib Mina, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5324; fax (562) 627–5210.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Los Angeles ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Material Incorporated by Reference

(o) You must use Boeing Alert Service Bulletin DC9–32A350, Revision 2, dated March 20, 2009, as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on November 19, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28564 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0797; Directorate Identifier 2009–CE–032–AD; Amendment 39–16118; AD 2009–25–01]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Corporation Models 58, 58A, 58P, 58PA, 58TC, 58TCA, 95–B55, 95–B55A, A36, A36TC, B36TC, E55, E55A, F33A, and V35B Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) to supersede AD 91–18–19, which applies to certain Hawker Beechcraft Corporation (Hawker) (Type Certificate Numbers 3A15, 3A16, and A23CE formerly held by Raytheon Aircraft Company; formerly held by Beech Aircraft Corporation) Models 58, 58A, 58P, 58PA, 58TC, 58TCA, 95–B55, 95–B55A, A36, A36TC, B36TC, E55, E55A, F33A, and V35B airplanes. AD 91–18–19 currently requires you to do a one-time inspection of the pilot and copilot shoulder harnesses for an incorrect washer and replace any incorrect washer with the correct washer. Since we issued AD 91–18–19, we have found that the applicability of AD 91–18–19 was incorrectly stated when the Model A36TC airplane was omitted from the Applicability section. Consequently, this AD would retain the actions and the serial number (SN) applicability of AD 91–18–19 and realign the SN applicability for Models A36TC and B36TC airplanes. We are issuing this AD to detect and correct an incorrect washer installed in the pilot and copilot shoulder harnesses. This incorrect part could result in a malfunctioning shoulder harness. Such a malfunction could lead to occupant injury.

DATES: This AD becomes effective on January 8, 2010.

As of October 21, 1991 (56 FR 42224, August 27, 1991), the Director of the Federal Register approved the incorporation by reference of Beechcraft Mandatory Service Bulletin No. 2394, dated December 1990, listed in this AD.

ADDRESSES: For service information identified in this AD, contact Hawker Beechcraft Corporation, P.O. Box 85, Wichita, Kansas 67201–0085; *telephone:* (800) 429–5372 or (316) 676–3140; *Internet: http://pubs.hawkerbeechcraft.com.*

To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov.* The docket number is FAA–2009–0797; Directorate Identifier 2009–CE–032–AD.

FOR FURTHER INFORMATION CONTACT: Steve Potter, Aerospace Engineer, 1801 Airport Road, Room 100, Wichita, Kansas 67209; *telephone:* (316) 946–4124; *fax:* (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

On August 20, 2009, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Hawker (Type Certificate Numbers 3A15, 3A16, and A23CE formerly held by Raytheon Aircraft Company; formerly held by Beech Aircraft Corporation) Models 58, 58A, 58P, 58PA, 58TC, 58TCA, 95–B55, 95–B55A, A36, A36TC, B36TC, E55, E55A, F33A, and V35B airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 28, 2009 (74 FR 44311). The NPRM proposed to supersede AD 91–18–19 (56 FR 42224, August 27, 1991) with a new AD that would retain the actions and the SN applicability of AD 91–18–19 and realign the SN applicability for Models A36TC and B36TC airplanes.

Comments

We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD affects 4,792 airplanes in the U.S. registry.

We estimate the following costs to do the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work-hour × $80 per hour = $80	Not applicable	$80	$383,360

We estimate the following costs to do any necessary replacements that would be required based on the results of the inspection. We have no way of determining the number of airplanes that may need this replacement:

Labor cost	Parts cost	Total cost per airplane
1 work-hour × $80 per hour = $80	$5	$85

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this AD.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include ''Docket No. FAA–2009–0797; Directorate Identifier 2009–CE–032–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 91–18–19, Amendment 39–8022 (56 FR 42224, August 27, 1991), and adding the following new AD:

2009–25–01 Hawker Beechcraft Corporation: Amendment 39–16118; Docket No. FAA–2009–0797; Directorate Identifier 2009–CE–032–AD.

Effective Date

(a) This AD becomes effective on January 8, 2010.

Affected ADs

(b) This AD supersedes AD 91–18–19, Amendment 39–8022.

Applicability

(c) This AD applies to the following airplane models and serial numbers that are certificated in any category:

(1) *Group 1 Airplanes* (retains the actions and applicability from AD 91–18–19):

Model	Serial Nos. (SNs)
58, 58A	TH–733 through TH–1609.
58P, 58PA	TJ–3 through TJ–497.
58TC, 58TCA	TK–1 through TK–151.
95–B55, 95–B55A	TC–1947 through TC–2456.
A36	E–825 through E–2578.
B36TC	EA–242 and EA–273 through EA–509.
E55, E55A	TE–1078 through TE–1201.
F33A	CE–634 through CE–1536.
V35B	D–9862 through D–10403.

(2) *Group 2 Airplanes* (aligns certain SNs applicability to Models A36TC airplanes):

Model	SNs
A36TC	EA–1 through EA–241 and EA–243 through EA–272.

Unsafe Condition

(d) This AD results from reports of incorrect washers installed in the pilot and copilot shoulder harnesses on certain Beech 33, 35, 36, 55, 58, and 95 series airplanes. We are issuing this AD to detect and correct an incorrect washer installed in the pilot and copilot shoulder harnesses. This incorrect part could result in a malfunctioning shoulder harness. Such a malfunction could lead to occupant injury.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Inspect the washers on the ''D'' ring of the pilot and copilot shoulder harnesses for correct metal, inner and outer diameter, and thickness.	(i) *For Group 1 Airplanes:* Within the next 100 hours time-in-service (TIS) after October 21, 1991 (the effective date of AD 91–18–19). (ii) *For Group 2 Airplanes:* Within the next 100 hours TIS after January 8, 2010 (the effective date of this AD).	Follow Beechcraft Mandatory Service Bulletin No. 2394, dated December 1990.

Actions	Compliance	Procedures
(2) If you find, as a result of the inspection required by paragraph (e)(1) of this AD, any washer does not meet the criteria for correct metal, inner and outer diameter, and thickness, replace the incorrect washer with part number 100951X060YA washer.	Before further flight, after the inspection required by paragraph (e)(1) of this AD.	Follow Beechcraft Mandatory Service Bulletin No. 2394, dated December 1990.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Steve Potter, Aerospace Engineer, ACE–118W, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Wichita, Kansas 67209; *telephone:* (316) 946–4124; *fax:* (316) 946–4107. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(g) In reviewing the docket and project files, we found no AMOCs submitted for AD 91–18–19. Since there are no AMOCs approved for AD 91–18–19 to approve for this AD, transfer of AMOCs to this AD does not apply.

Material Incorporated by Reference

(h) You must use Beechcraft Mandatory Service Bulletin No. 2394, dated December 1990, to do the actions required by this AD, unless the AD specifies otherwise. AD 91–18–19 (56 FR 42224; August 27, 1991), which is superseded by this airworthiness directive, incorporated this service information by reference as Beech Service Bulletin No. 2394, dated December 1990.

(1) On October 21, 1991 (56 FR 42224, August 27, 1991), the Director of the Federal Register approved the incorporation by reference of Beechcraft Mandatory Service Bulletin No. 2394, dated December 1990, under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Hawker Beechcraft Corporation, P.O. Box 85, Wichita, Kansas 67201–0085; *telephone:* (800) 429–5372 or (316) 676–3140; *Internet: http://pubs.hawkerbeechcraft.com.*

(3) You may review copies of the service information incorporated by reference for this AD at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the Central Region, call (816) 329–3768.

(4) You may also review copies of the service information incorporated by reference for this AD at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on November 20, 2009.

Margaret Kline,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28565 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0868; Directorate Identifier 2009–CE–047–AD; Amendment 39–16120; AD 2009–25–03]

RIN 2120–AA64

Airworthiness Directives; ZLT Zeppelin Luftschifftechnik GmbH & Co KG Model LZ N07–100 Airships

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

The manufacturer has advised of receiving a report that during start up on ground a RH propeller gear box (PGB) on the airship has failed resulting in free rotation of the propeller. Investigation performed by the manufacturer revealed that the bevel gear in the propeller gearbox had cracked near the hub area.

During an extensive metallurgical investigation of the cracked bevel gear some different manufacturing deviations outside of the specifications were detected. Deviations in the heat treatment, wall thickness of the bevel gear near the hub area, and score marks caused during the production process have been established as causal factors for this failure.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 8, 2010.

On January 8, 2010, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090; e-mail: *karl.schletzbaum@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 21, 2009 (74 FR 48019). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

The manufacturer has advised of receiving a report that during start up on ground a RH propeller gear box (PGB) on the airship has failed resulting in free rotation of the propeller. Investigation performed by the manufacturer revealed that the bevel gear in the propeller gearbox had cracked near the hub area.

During an extensive metallurgical investigation of the cracked bevel gear some different manufacturing deviations outside of the specifications were detected. Deviations in the heat treatment, wall thickness of the bevel gear near the hub area, and score marks caused during the production process have been established as causal factors for this failure.

For the reasons described above, this new AD mandates the replacement of the affected bevel gears, and limits, as a temporary measure, their service-life to 1,000 Flight Hours (for non-refurbished PGBs) and to 1,600 Flight Hours (for refurbished PGBs).

You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD will affect 1 product of U.S. registry. We also estimate that it will take about 18 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $66,488 per gear box replacement. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here.

Based on these figures, we estimate the cost of this AD on U.S. operators to be $67,928 per gear box replacement.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD Docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2009–25–03 ZLT Zeppelin Luftschifftechnik GmbH & Co KG: Amendment 39–16120; Docket No. FAA–2009–0868; Directorate Identifier 2009–CE–047–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model LZ N07–100 airships, serial numbers 002, 003, and 004, that are certificated in any category and are equipped with the following propeller gear boxes:

Part No.	Serial No.	Designation
07 722 0001–200.	103, 106, 109, 112, 401, 401.	AFT propeller gear box.
07 722 0002–200.	101, 104, 107, 110, 201.	LH propeller gear box.
07 722 0003–200.	102, 105, 108, 111, 301, 302.	RH propeller gear box.

Subject

(d) Air Transport Association of America (ATA) Code 65: Tail Rotor Drive.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

The manufacturer has advised of receiving a report that during start up on ground a RH propeller gear box (PGB) on the airship has failed resulting in free rotation of the propeller. Investigation performed by the manufacturer revealed that the bevel gear in the propeller gearbox had cracked near the hub area.

During an extensive metallurgical investigation of the cracked bevel gear some different manufacturing deviations outside of the specifications were detected. Deviations in the heat treatment, wall thickness of the bevel gear near the hub area, and score marks caused during the production process have been established as causal factors for this failure.

For the reasons described above, this new AD mandates the replacement of the affected bevel gears, and limits, as a temporary measure, their service-life to 1 000 Flight Hours (for non-refurbished PGBs) and to 1 600 Flight Hours (for refurbished PGBs).

Actions and Compliance

(f) Unless already done, do the following actions in accordance with ZLT Zeppelin Luftschifftechnik GmbH & Co KG Service Bulletin S07 830 0001, Issue B–00, dated June 29, 2009:

(1) As of January 8, 2010 (the effective date of this AD), before the accumulation of the

applicable total hours time-in-service (TIS) as defined in the appendix of ZLT Zeppelin Luftschifftechnik GmbH & Co KG Service Bulletin S07 830 0001, Issue B–00, dated June 29, 2009, replace the bevel gears of the propeller gearbox.

(2) As of January 8, 2010 (the effective date of this AD), for airships with a propeller gear box identified in paragraph (c)(1) of this AD that have exceeded the applicable total hours TIS as defined in the appendix of ZLT Zeppelin Luftschifftechnik GmbH & Co KG Service Bulletin S07 830 0001, Issue B–00, dated June 29, 2009, replace the bevel gears of the propeller gearbox within the next 30 days after January 8, 2010 (the effective date of this AD).

(3) As of January 8, 2010 (the effective date of this AD), airships with a propeller gear box S/N 102, 107, 108, 109, or 112, contact the manufacturer at ZLT Zeppelin Luftschifftecnik GmbH & Co KG, 88046 Friedrichsfafen, Allmannsweilerstrasse 132, Germany; telephone: + 49 (0) 7541–5900–546; fax: + 40 (0) 7541–5900–516, to obtain a repair scheme within the next 30 days after January 8, 2010 (the effective date of this AD). Incorporate the repair scheme before further flight after receipt.

(4) After doing the replacements required in paragraphs (f)(1), (f)(2), and (f)(3) of this AD, replace the bevel gears of the propeller gearbox thereafter at intervals not to exceed 1,600 hours TIS on the propeller gearbox.

Note 1: The time between overhaul for gear boxes specified in the airship maintenance manual remains unchanged.

Note 2: Airships with a propeller gear box S/N 102, 107, 108, 109, or 112 have exceeded their life limit and are not eligible for bevel gear replacement. See paragraph (f)(3) of this AD.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; fax: (816) 329–4090; email: *karl.schletzbaum@faa.gov.* Before using any approved AMOC on any airship to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2009–0182, dated August 20, 2009; and ZLT Zeppelin Luftschifftechnik GmbH & Co KG Service Bulletin S07 830 0001, Issue B–00, dated June 29, 2009, for related information.

Material Incorporated by Reference

(i) You must use ZLT Zeppelin Luftschifftechnik GmbH & Co KG Service Bulletin S07 830 0001, Issue B–00, dated June 29, 2009, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact ZLT Zeppelin Luftschifftecnik GmbH & Co KG, 88046 Friedrichsfafen, Allmannsweilerstrasse 132, Germany; telephone: + 49 (0) 7541–5900–546; fax: + 40 (0) 7541–5900–516; Internet: *http://www.zeppelinflug.de/.*

(3) You may review copies of the service information incorporated by reference for this AD at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the Central Region, call (816) 329–3768.

(4) You may also review copies of the service information incorporated by reference for this AD at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on November 20, 2009.

Margaret Kline,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28558 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0379; Directorate Identifier 2008–NM–220–AD; Amendment 39–16113; AD 2009–24–19]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A320 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An A320 operator experienced difficulties in extending the RAT [ram air turbine] during a deployment testing.

During the trouble shooting, the Ejection Jack of the RAT was removed and investigated.

The investigation identified excessive wear of the uplock segments against the inner cylinder of the Ejection Jack, due to an incorrect blend radius of the inner cylinder. * * *

This Ejection Jack failure may prevent the effective deployment and use of the RAT in emergency conditions.

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 8, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 8, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on April 29, 2009 (74 FR 19462). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> An A320 operator experienced difficulties in extending the RAT [ram air turbine] during a deployment testing.
>
> During the trouble shooting, the Ejection Jack of the RAT was removed and investigated.
>
> The investigation identified excessive wear of the uplock segments against the inner cylinder of the Ejection Jack, due to an incorrect blend radius of the inner cylinder. This problem was determined to be caused during the previous rework of the Ejection Jack and was possible due to the incomplete requirements contained within the Component Maintenance Manual (CMM).
>
> This Ejection Jack failure may prevent the effective deployment and use of the RAT in emergency conditions.
>
> This AD therefore mandates the replacement of an Ejection Jack that has been previously reworked in accordance with the incomplete CMM requirements. This will restore the reliability of the Ejection Jack of the RAT.
>
> The implementation of this modification was originally managed by an Airbus monitoring campaign. However, the rate of installation of the corrective action by operators has not met the predicated [sic] target. As such and to ensure continued compliance with the certification requirements, it is considered necessary to require compliance by means of an AD.

You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request for Inclusion of Airbus Model A320 Only

Both Airbus and Virgin America request that we revise the applicability section (paragraph (c)) of the NPRM to state that only Airbus Model A320 airplanes are affected. The commenters note that Airbus Model A318, A319, and A321 series airplanes are equipped with Sundstrand RATs as part of the basic type design per Airbus modification 22803 and that there is no option to install Hamilton Sundstrand (formerly Dowty) RATs, which is the subject of this AD.

We agree, for the reason stated above, and have removed Airbus Model A318, A319, and A321 airplanes from the applicability statement of this AD. We also noted this change as a difference between European Aviation Safety Agency (EASA) Airworthiness Directive 2008–0199, dated November 5, 2008, and the FAA AD in Note 1 of this AD. We coordinated with European Aviation Safety Agency on this issue.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the change described previously. We determined that this change will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD affects 187 products of U.S. registry. We also estimate that it takes about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $29,920, or $160 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2009–24–19 Airbus: Amendment 39–16113. Docket No. FAA–2009–0379; Directorate Identifier 2008–NM–220–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A320–111, –211, –212, –214, –231, –232, and –233 series airplanes, certificated in any category, all certified models, all serial numbers, equipped with Hamilton Sundstrand (formerly Dowty) Ram Air Turbine (RAT) Ejection Jack, Model ERPS13EJ, part number (P/N) 114160004A or 114160005, except those airplanes on which Airbus modification 27189 was done in production or Airbus Service Bulletin A320–29–1100 was done in service, and on which Airbus modification 28413 was not done in production.

Subject

(d) Air Transport Association (ATA) of America Code 29: Hydraulic Power.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

An A320 operator experienced difficulties in extending the RAT during a deployment testing.

During the trouble shooting, the Ejection Jack of the RAT was removed and investigated.

The investigation identified excessive wear of the uplock segments against the inner cylinder of the Ejection Jack, due to an incorrect blend radius of the inner cylinder. This problem was determined to be caused during the previous rework of the Ejection Jack and was possibly due to the incomplete requirements contained within the Component Maintenance Manual (CMM).

This Ejection Jack failure may prevent the effective deployment and use of the RAT in emergency conditions.

This AD therefore mandates the replacement of an Ejection Jack that has been previously reworked in accordance with the incomplete CMM requirements. This will restore the reliability of the Ejection Jack of the RAT.

The implementation of this modification was originally managed by an Airbus monitoring campaign. However, the rate of installation of the corrective action by operators has not met the predicated [sic] target. As such and to ensure continued compliance with the certification requirements, it is considered necessary to require compliance by means of an AD.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 12 months after the effective date of this AD, identify the serial number of the installed ejection jack of the RAT, in accordance with Accomplishment Instructions of Airbus Service Bulletin A320–29–1136, dated February 20, 2007. If the serial number is included in the affected batch identified in the service bulletin, before further flight, replace the ejection jack of the RAT with a modified or reworked ejection jack, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–29–1136, dated February 20, 2007.

(2) As of the effective date of this AD, no person may install a RAT Ejection Jack Model ERPS13EJ, P/N 114160004A or 114160005, on any airplane unless the ejection jack has been modified or reworked in accordance with Airbus Service Bulletin A320–29–1136, dated February 20, 2007.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: While the European Aviation Safety Agency AD 2008–0199, dated November 5, 2008, applies to Airbus Model A318, A319, and A321 series airplanes, this AD does not list these models for reasons explained in the Comments section of this AD.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2141; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2008–0199, dated November 5, 2008; and Airbus Service Bulletin A320–29–1136, dated February 20, 2007; for related information.

Material Incorporated by Reference

(i) You must use Airbus Service Bulletin A320–29–1136, excluding Appendix 01, dated February 20, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on November 19, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28556 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0565; Directorate Identifier 2008–NM–217–AD; Amendment 39–16112; AD 2009–24–18]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2A12 (CL–601) and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

* * * [I]ncidents of throttle jam and engine shutdowns, caused by premature wear of the rack and pinion mechanism of part number (P/N) 2100140–005 and –007 Engine Throttle Control Gearbox (ETCG), installed on Bombardier CL–601 and 604 aircraft.

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 8, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 8, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Rocco Viselli, Aerospace Engineer, Airframe and Mechanical Systems, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7331; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on June 23, 2009 (74 FR 29632). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> There have been various reported incidents of throttle jam and engine shutdowns, caused by premature wear of the rack and pinion mechanism of part number (P/N) 2100140–005 and –007 Engine Throttle Control Gearbox (ETCG), installed on Bombardier CL–601 and 604 aircraft.
>
> Bombardier issued service bulletins (SB) 601–0583 (CL601/601–3A, –3R) and 604–76–004 (CL 604), introducing periodic inspection of the affected ETCG rack and pinion mechanisms for wear.
>
> Subject inspection requirement tasks have now been incorporated into the applicable CL601 and CL604 Time Limits Maintenance Checks (TLMCs) through Temporary Revisions (TR), TR 5–236 (for CL601), TR 5–236 (for CL601–3A & –3R) and TR 5–2–40 (for CL604).

The required action is revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new repetitive functional tests of the ETCG. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

New Note

We have added Note 1 to this AD to clarify compliance with section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)).

Updated Contact Information

We have updated paragraph (g)(1) of this AD to provide the appropriate contact information to use when submitting requests for approval of an alternative method of compliance (AMOC).

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD will affect 377 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $30,160, or $80 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2009–24–18 Bombardier, Inc. (Formerly Canadair): Amendment 39–16112. Docket No. FAA–2009–0565; Directorate Identifier 2008–NM–217–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Bombardier Model CL–600–2A12 (CL–601) and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604) airplanes, certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g)(1) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

(d) Air Transport Association (ATA) of America Code 76: Engine controls.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

There have been various reported incidents of throttle jam and engine shutdowns, caused by premature wear of the rack and pinion mechanism of part number (P/N) 2100140–005 and –007 Engine Throttle Control Gearbox (ETCG), installed on Bombardier CL–601 and 604 aircraft.

Bombardier issued service bulletins (SB) 601–0583 (CL601/601–3A, –3R) and 604–76–004 (CL 604), introducing periodic inspection of the affected ETCG rack and pinion mechanisms for wear.

Subject inspection requirement tasks have now been incorporated into the applicable CL601 and CL604 Time Limits Maintenance Checks (TLMCs) through Temporary Revisions (TR), TR 5–236 (for CL601), TR 5–236 (for CL601–3A & –3R) and TR 5–2–40 (for CL604).

The required action is revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new repetitive functional tests of the ETCG.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 30 days after the effective date of this AD: Revise the Airworthiness Limitations section of the Instructions for Continued Airworthiness by incorporating the applicable task in the TR listed in Table 1 of this AD.

TABLE 1—TEMPORARY REVISIONS TO THE AIRWORTHINESS LIMITATIONS SECTION

For Bombardier model—	Use Canadair Challenger Temporary Revision—	Dated—	To the Airworthiness Limitations section of—
CL–600–2A12 (CL–601) airplanes.	5–236	July 25, 2008	Section 5–10–30 of Chapter 5 of the Canadair Challenger Time Limits/Maintenance Checks, PSP 601–5.
CL–600–2B16 (CL–601–3A, and CL–601–3R) airplanes.	5–236	March 22, 2007	Section 5–10–30 of Chapter 5 of the Canadair Challenger Time Limits/Maintenance Checks, PSP 601A–5.
CL–600–2B16 (CL–604) airplanes.	5–2–40	July 28, 2008	Section 5–10–40 of Chapter 5 of the Canadair Challenger CL–604 Time Limits/Maintenance Checks.

(2) For the new TLMC tasks identified in Canadair Challenger Temporary Revision 5–236, dated July 25, 2008; Temporary Revision 5–2–40, dated July 28, 2008; and Temporary Revision 5–236, dated March 22, 2007: Initial compliance with the new TLMC tasks must be carried out in accordance with the phase-in schedule detailed in the Canadair Challenger TRs 5–236 and TR 5–2–40, as applicable, after the effective date of this AD. Thereafter, except as provided by paragraph (g)(1) of this AD, no alternative TLMC task intervals may be used.

(3) When information in a TR specified in paragraph (f)(1) has been included in the general revisions of the applicable Airworthiness Limitations section, the TR may be removed from that Airworthiness Limitations section of the Instruction for Continued Airworthiness.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Canadian Airworthiness Directive CF–2008–32R2, dated November 17, 2008, and the service information identified in Table 2 of this AD for related information.

TABLE 2—REFERENCED SERVICE INFORMATION

Canadair Challenger Temporary Revision—	Dated—	To the Airworthiness Limitations section of—
5–236	July 25, 2008	Section 5–10–30 of Chapter 5 of the Canadair Challenger Time Limits/Maintenance Checks, PSP 601–5.

TABLE 2—REFERENCED SERVICE INFORMATION—Continued

Canadair Challenger Temporary Revision—	Dated—	To the Airworthiness Limitations section of—
5–236	March 22, 2007	Section 5–10–30 of Chapter 5 of the Canadair Challenger Time Limits/Maintenance Checks, PSP 601A–5.
5–2–40	July 28, 2008	Section 5–10–40 of Chapter 5 of the Canadair Challenger CL–604 Time Limits/Maintenance Checks.

Material Incorporated by Reference

(i) You must use the applicable service information contained in Table 3 of this AD to do the actions required by this AD, unless the AD specifies otherwise.

TABLE 3—MATERIAL INCORPORATED BY REFERENCE

Canadair Challenger Temporary Revision—	Dated—	To the Airworthiness Limitations section of—
5–236	July 25, 2008	Section 5–10–30 of Chapter 5 of the Canadair Challenger Time Limits/Maintenance Checks, PSP 601–5.
5–236	March 22, 2007	Section 5–10–30 of Chapter 5 of the Canadair Challenger Time Limits/Maintenance Checks, PSP 601A–5.
5–2–40	July 28, 2008	Section 5–10–40 of Chapter 5 of the Canadair Challenger CL–604 Time Limits/Maintenance Checks.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road, West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com*; Internet *http://www.bombardier.com*.

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on November 19, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28554 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0553; Directorate Identifier 2008–NM–199–AD; Amendment 39–16111; AD 2009–24–17]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, 747–100B, 747–200B, 747–200C, 747–200F, and 747SR Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are issuing a new airworthiness directive (AD) for certain Boeing Model 747–100, 747–100B, 747–200B, 747–200C, 747–200F, and 747SR series airplanes. This AD requires a one-time general visual inspection for missing fasteners in certain stringer-to-stringer clip joints at the station (STA) 760 through STA 940 frames, and related investigative and corrective actions if necessary. This AD results from a report of broken and cracked frame shear ties, cracks on the frame doubler and frame web, and missing fasteners in the stringer (S) –10L stringer-to-stringer clip joint at the STA 820 frame. We are issuing this AD to detect and correct missing fasteners in the stringer-to-stringer clip joints, which could result in shear tie and skin cracks and rapid in-flight decompression of the airplane.

DATES: This AD is effective January 8, 2010.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of January 8, 2010.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207; telephone 206–544–9990; fax 206–766–5682; e-mail *DDCS@boeing.com*; Internet *https://www.myboeingfleet.com*.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Nick Kusz, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6449; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Model 747–100, 747–100B, 747–200B, 747–200C, 747–200F, and 747SR series airplanes. That NPRM was published in the **Federal Register** on June 23, 2009 (74 FR 29630). That NPRM proposed to require a one-time general visual inspection for missing fasteners in certain stringer-to-stringer clip joints at the station (STA) 760 through STA 940 frames, and related investigative and corrective actions if necessary.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received. Boeing concurs with the contents of the NPRM.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD affects 84 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per product	Number of U.S.-registered airplanes	Fleet cost
Inspection	4	$80	$0	$320 per inspection cycle.	84	$26,880 per inspection cycle.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979), and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2009–24–17 Boeing: Amendment 39–16111. Docket No. FAA–2009–0553; Directorate Identifier 2008–NM–199–AD.

Effective Date

(a) This airworthiness directive (AD) is effective January 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 747–100, 747–100B, 747–200B, 747–200C, 747–200F, and 747SR series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 747–53A2751, dated October 9, 2008.

Subject

(d) Air Transport Association (ATA) of America Code 53: Fuselage.

Unsafe Condition

(e) This AD results from a report of broken and cracked frame shear ties, cracks on the frame doubler and frame web, and missing fasteners in the stringer (S)–10L stringer-to-stringer clip joint at the station (STA) 820 frame. We are proposing this AD to detect and correct missing fasteners at the stringer-to-stringer clip joints, which could result in shear tie and skin cracks and rapid in-flight decompression of the airplane.

Compliance

(f) Comply with this AD within the compliance times specified, unless already done.

Inspection for Missing Fasteners

(g) Within 3,000 flight cycles after the effective date of this AD: Do a one-time general visual inspection for missing fasteners in the left and right side S–10, S–10A, and S–11 stringer-to-stringer clip joints at the STA 760 through 940 frames, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2751, dated October 9, 2008. If any fasteners are missing, before further flight, do detailed and surface high frequency eddy current inspections to detect cracking of the adjacent frame and skin structure in accordance with the Accomplishment Instructions of the service bulletin. Install all missing fasteners before further flight.

(h) If any crack is found during the inspection required by paragraph (g) of this AD: Before further flight, repair any cracked shear ties, frame web, and/or skin in accordance with Boeing Alert Service Bulletin 747–53A2751, dated October 9, 2008.

(i) If any repair is done in accordance with paragraph (h) of this AD, before 20,000 total flight cycles or within 3,000 flight cycles from the repair installation, whichever occurs later: Do a detailed inspection of the repair(s) and the adjacent structure within 10

inches of the repair(s) for cracking. Repeat the inspection thereafter at intervals not to exceed 3,000 flight cycles. If any crack is found during this inspection, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

Alternative Methods of Compliance (AMOCs)

(j)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Nick Kusz, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6449; fax (425) 917–6590. Or, e-mail information to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, in the FAA Flight Standards District Office (FSDO), or lacking a principal inspector, your local FSDO. The AMOC approval letter must specifically reference this AD.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Material Incorporated by Reference

(k) You must use Boeing Alert Service Bulletin 747–53A2751, dated October 9, 2008, as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207; telephone 206–544–9990; fax 206–766–5682; e-mail *DDCS@boeing.com;* Internet *https://www.myboeingfleet.com*.

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on November 19, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28552 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0436; Directorate Identifier 2009–NM–005–AD; Amendment 39–16114; AD 2009–24–20]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2C10 (Regional Jet Series 700 & 701) Airplanes and CL–600–2D24 (Regional Jet Series 900) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Frost, snow, slush or ice on the wing leading edges and upper wing surfaces may change the stall speeds, stall characteristics and the protection provided by the stall protection system, which could result in reduced controllability of the aircraft.

* * * * *

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 8, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 8, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Bruce Valentine, Aerospace Engineer, Avionics and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7328; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on May 12, 2009 (74 FR 22123). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Frost, snow, slush or ice on the wing leading edges and upper wing surfaces may change the stall speeds, stall characteristics and the protection provided by the stall protection system, which could result in reduced controllability of the aircraft.

Transport Canada has * * * approved temporary revisions to the Aircraft Flight Manuals (AFM), which emphasize the cold weather operational requirements to ensure that the wing leading edges and upper wing surfaces are free from frost, snow, slush or ice.

The corrective action is revising the AFMs to introduce procedures for cold weather operations. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Include Updated Temporary Revisions (TRs)

Two commenters, Comair and Michael Donahue, request that we revise paragraph (f) of the NPRM to require inclusion of the updated TRs in the applicable AFM. The commenters both state that the TRs identified in the NPRM have been updated.

Comair states that Bombardier (Canadair) TR RJ 900/48–3, dated August 19, 2008, to the Bombardier (Canadair) Regional Jet Series 900 AFM, CSP C–012, was superseded by Bombardier (Canadair) TR RJ 900/75, dated November 20, 2008; which was superseded by Bombardier (Canadair) TR RJ 900/75–1, dated November 20, 2008; which was superseded by Bombardier (Canadair) TR RJ 900/75–2, dated April 22, 2009. Comair states that Bombardier (Canadair) TR RJ 900/75–2 needs to be inserted in the Bombardier (Canadair) Regional Jet Series 900 AFM, CSP C–012.

Comair also states that Bombardier (Canadair) TR RJ 700/87–3, dated

August 19, 2008 (which was superseded by Bombardier (Canadair) TR RJ 700/107, dated November 20, 2008), to the Bombardier (Canadair) Regional Jet Series 700 and 701 AFM, CSP B–012, was superseded by Bombardier (Canadair) TR RJ 700/107–1, dated November 20, 2008; which needs to be inserted in the Bombardier (Canadair) Regional Jet Series 700 and 701 AFM, CSP B–012.

We agree that the latest TRs need to be included in the final rule. The new TRs introduce a new ozone converter option code and revise the applicability of the ozone concentration limitation. The new TRs do not add any new requirements. Paragraph (f) of this AD has been updated accordingly.

Updated Contact Information

We have updated paragraph (g)(1) of this AD to provide the appropriate contact information to use when submitting requests for approval of an alternative method of compliance (AMOC).

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

We estimate that this AD will affect 336 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $26,880, or $80 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2009–24–20 Bombardier, Inc. (Formerly Canadair): Amendment 39–16114. Docket No. FAA–2009–0436; Directorate Identifier 2009–NM–005–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Bombardier Model CL–600–2C10 (Regional Jet Series 700 and 701) airplanes and CL–600–2D24 (Regional Jet Series 900) airplanes, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Frost, snow, slush or ice on the wing leading edges and upper wing surfaces may change the stall speeds, stall characteristics and the protection provided by the stall protection system, which could result in reduced controllability of the aircraft.

Transport Canada has * * * approved temporary revisions to the Aircraft Flight Manuals (AFM), which emphasize the cold weather operational requirements to ensure that the wing leading edges and upper wing surfaces are free from frost, snow, slush or ice.

The corrective action is revising the AFMs to introduce procedures for cold weather operations.

Actions and Compliance

(f) Unless already done, within 14 days after the effective date of this AD, revise the Limitations—Operating Limitations section of the Bombardier (Canadair) Regional Jet Series 900 Airplane Flight Manual (AFM), CSP C–012; and the Bombardier (Canadair) Regional Jet Series 700 and 701 AFM, CSP B–012; to include the information in the

Bombardier (Canadair) temporary revisions identified in Table 1 and Table 2 of this AD, as applicable. For Model CL–600–2D24 (Regional Jet Series 900) airplanes, include the information in any one of the TRs in Table 1 of this AD; for Model CL–600–2C10 (Regional Jet Series 700 and 701) airplanes, include the information in any one of the TRs in Table 2 of this AD. These TRs introduce procedures for cold weather operations to ensure that the wing leading edges and upper wing surfaces are free from frost, snow, slush, and ice. Operate the airplane according to the limitations and procedures in the applicable TRs.

Note 1: This may be done by inserting a copy of the applicable TR into the applicable AFM. When the TR has been included in general revision of the applicable AFM, the general revision may be inserted into the AFM, provided the relevant information in the general revision is identical to the applicable AFM.

TABLE 1—TEMPORARY REVISIONS FOR BOMBARDIER (CANADAIR) REGIONAL JET SERIES 900 AFM, CSP C–012

Bombardier (Canadair) TR—	Dated—
RJ 900/48–3	August 19, 2008.
RJ 900/75	November 20, 2008.
RJ 900/75–1	November 20, 2008.
RJ 900/75–2	April 22, 2009.

TABLE 2—TEMPORARY REVISIONS FOR BOMBARDIER (CANADAIR) REGIONAL JET SERIES 700 AND 701 AFM, CSP B–012

Bombardier (Canadair) TR—	Dated—
RJ 700/87–3	August 19, 2008.
RJ 700/107	November 20, 2008.
RJ 700/107–1	November 20, 2008.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, 1600 Stewart Avenue, Suite 41, Westbury, New York 11590; telephone (516) 228–7300; fax (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Canadian Airworthiness Directive CF–2005–02 dated February 2, 2005; and the Bombardier (Canadair) TRs identified in Tables 1 and 2 of this AD; for related information.

Material Incorporated by Reference

(i) You must use the applicable service information contained in Table 3 of this AD to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

TABLE 3—MATERIAL INCORPORATED BY REFERENCE

Bombardier (Canadair) temporary revision—	Dated—	To the—
RJ 700/87–3	August 19, 2008	Bombardier (Canadair) Regional Jet Series 700 and 701 Aircraft Flight Manual (AFM), CSP B–012.
RJ 700/107	November 20, 2008	Bombardier (Canadair) Regional Jet Series 700 and 701 AFM, CSP B–012.
RJ 700/107–1	November 20, 2008	Bombardier (Canadair) Regional Jet Series 700 and 701 AFM, CSP B–012.
RJ 900/48–3	August 19, 2008	Bombardier (Canadair) Regional Jet Series 900 AFM, CSP C–012.
RJ 900/75	November 20, 2008	Bombardier (Canadair) Regional Jet Series 900 AFM, CSP C–012.
RJ 900/75–1	November 20, 2008	Bombardier (Canadair) Regional Jet Series 900 AFM, CSP C–012.
RJ 900/75–2	April 22, 2009	Bombardier (Canadair) Regional Jet Series 900 AFM, CSP C–012.

Issued in Renton, Washington, on November 19, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28551 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–1106; Directorate Identifier 2009–NM–171–AD; Amendment 39–16122; AD 2008–09–24 R1]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–400, DHC–8–401, and DHC–8–402 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above that would revise an existing AD. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Bombardier Aerospace has completed a system safety review of the aircraft fuel system against fuel tank safety standards introduced in Chapter 525 of the Airworthiness Manual through Notice of Proposed Amendment (NPA) 2002–043. The identified non-compliances were then assessed using Transport Canada Policy Letter No. 525–001, to determine if mandatory corrective action is required.

The assessment showed that it is necessary to introduce Critical Design Configuration Control Limitations (CDCCL), in order to preserve critical fuel tank system ignition source prevention features during configuration changes such as modifications and repairs, or during maintenance actions. Failure to preserve critical fuel tank system ignition source prevention features could result in a fuel tank explosion. * * *

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective December 21, 2009.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of December 21, 2009.

On June 6, 2008 (73 FR 24143, May 2, 2008), the Director of the Federal Register approved the incorporation by reference of certain other publications listed in the AD.

We must receive comments on this AD by January 19, 2010.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey, Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Richard Fiesel, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7304; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

On April 24, 2008, we issued AD 2008–09–24, Amendment 39–15505 (73 FR 24143, May 2, 2008). That AD applied to all Bombardier Model DHC–8–400, DHC–8–401, and DHC–8–402 airplanes. That AD required revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to incorporate the CDCCLs specified in Dash 8 Q400 (Bombardier) Temporary Revisions (TRs) ALI–55, dated April 19, 2006; and ALI–56, dated April 19, 2006; to Part 2, ''Airworthiness Limitations Items,'' of the Bombardier Dash 8 Q400 Maintenance Requirements Manual (MRM) PSM 1–84–7.

Critical design configuration control limitations (CDCCLs) are limitation requirements to preserve a critical ignition source prevention feature of the fuel tank system design that is necessary to prevent the occurrence of an unsafe condition. The purpose of a CDCCL is to provide instruction to retain the critical ignition source prevention feature during configuration change that may be caused by alterations, repairs, or maintenance actions. A CDCCL is not a periodic inspection.

Since we issued that AD, we have determined that it is necessary to clarify the AD's intended effect on spare and on-airplane fuel tank system components, regarding the use of maintenance manuals and instructions for continued airworthiness.

Section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)) specifies the following:

> No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitation section unless the mandatory * * * procedures * * * have been complied with.

Some operators have questioned whether existing components affected by the new CDCCLs must be reworked. We did not intend for the AD to retroactively require rework of components that had been maintained using acceptable methods before the effective date of the AD. Owners and operators of the affected airplanes therefore are not required to rework affected components identified as airworthy or installed on the affected airplanes before the required revisions of the ALS. But once the CDCCLs are incorporated into the ALS, future maintenance actions on components must be done in accordance with those CDCCLs.

Relevant Service Information

AD 2008–09–24 cites Dash 8 Q400 (Bombardier) Temporary Revision (TR) ALI–55, dated April 19, 2006; and TR ALI–56, dated April 19, 2006; to Part 2, ''Airworthiness Limitations Items,'' of the Bombardier Dash 8 Q400 Maintenance Requirements Manual PSM 1–84–7. Since we issued that AD, Bombardier has revised the referenced service information. We have reviewed Dash 8 Q400 (Bombardier) TR ALI–76, dated January 24, 2008, to Part 2, ''Airworthiness Limitations Items,'' of the Bombardier Dash 8 Q400 MRM PSM

1–84–7. The revised TR supersedes and cancels TR ALI–56 and updates applicability information, but adds no new procedures.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. This new AD retains the requirements of the existing AD, and adds a new note to clarify the intended effect of the AD on spare and on-airplane fuel tank system components.

Explanation of Additional Change to AD

AD 2008–09–24 allowed the use of alternative CDCCLs if they are part of a later revision of Part 2, Revision 4, dated October 30, 2003, of the Bombardier Dash 8 Q400 MRM PSM 1–84–7, Revision 4. That provision has been removed from this AD. Allowing the use of ''a later revision'' of a specific service document violates Office of the Federal Register regulations for approving materials that are incorporated by reference. Affected operators, however, may request approval to use an alternative CDCCL that is part of a later revision of the referenced service document as an alternative method of compliance, under the provisions of paragraph (g)(1) of this AD.

Differences Between the AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the AD.

Costs of Compliance

This revision imposes no additional economic burden. The current costs for this AD are repeated for the convenience of affected operators, as follows:

We estimate that this AD will affect about 45 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $3,600, or $80 per product.

FAA's Justification and Determination of the Effective Date

This revision merely clarifies the intended effect on spare and on-airplane fuel tank system components, and makes no substantive change to the AD's requirements. For this reason, it is found that notice and opportunity for prior public comment for this action are unnecessary, and good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2009–1106; Directorate Identifier 2009–NM–171–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing amendment 39–15505 (73 FR 24143, May 2, 2008) and adding the following new AD:

2008–09–24 R1 BOMBARDIER, INC. (Formerly de Havilland, Inc.): Amendment 39–16122. Docket No. FAA–2009–1106; Directorate Identifier 2009–NM–171–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 21, 2009.

Affected ADs

(b) This AD revises AD 2008–09–24, Amendment 39–15505.

Applicability

(c) This AD applies to all Bombardier Model DHC–8–400, DHC–8–401, and DHC–8–402 airplanes, certificated in any category, all serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 28: Fuel.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

''Bombardier Aerospace has completed a system safety review of the aircraft fuel system against fuel tank safety standards introduced in Chapter 525 of the Airworthiness Manual through Notice of Proposed Amendment (NPA) 2002–043. The identified non-compliances were then assessed using Transport Canada Policy Letter No. 525–001, to determine if mandatory corrective action is required.''

''The assessment showed that it is necessary to introduce Critical Design Configuration Control Limitations (CDCCL), in order to preserve critical fuel tank system ignition source prevention features during configuration changes such as modifications and repairs, or during maintenance actions. Failure to preserve critical fuel tank system ignition source prevention features could result in a fuel tank explosion. Revisions have been made to Part 2 ''Airworthiness Limitations Items'' of the Maintenance Requirements Manual of the affected models to introduce the required CDCCL.''

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness to include the CDCCL data.

Restatement of Requirements of AD 2008–09–24, With Updated Service Information

Actions and Compliance

(f) Unless already done, do the following actions.

(1) For all airplanes: Within 60 days after June 6, 2008 (the effective date of AD 2008–09–24), revise the ALS of the Instructions for Continued Airworthiness to incorporate the CDCCLs specified in Dash 8 Q400 (Bombardier) Temporary Revisions (TRs) ALI–55, dated April 19, 2006; ALI–56, dated April 19, 2006; and TR ALI–76, dated January 24, 2008; to Part 2, ''Airworthiness Limitations Items,'' of the Bombardier Dash 8 Q400 Maintenance Requirements Manual (MRM) PSM 1–84–7.

Note 1: The actions required by paragraph (f)(1) of this AD may be done by inserting a copy of the applicable TRs into the maintenance requirements manual. When the TRs have been included in the general revision of the maintenance program, the general revision may be inserted into the maintenance requirements manual, provided the relevant information in the general revision is identical to that in the applicable TRs, and the TRs may be removed.

(2) After accomplishing the actions specified in paragraph (f)(1) of this AD, no alternative CDCCLs may be used unless the CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (g)(1) of this AD.

New Information

Explanation of CDCCL Requirements

Note 2: Notwithstanding any other maintenance or operational requirements, components that have been identified as airworthy or installed on the affected airplanes before the revision of the ALS, as required by paragraph (f)(1) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the ALS has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York, 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to ensure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Canadian Airworthiness Directive CF–2008–06, dated January 15, 2008, and the service information specified in Table 1 of this AD, for related information.

TABLE 1—RELATED SERVICE INFORMATION

Dash 8 Q400 (Bombardier) TR—	Dated—
ALI–55	April 19, 2006.
ALI–56	April 19, 2006.
ALI–76	January 24, 2008.

Material Incorporated by Reference

(i) You must use the service information specified in Table 2 of this AD, as applicable, to do the actions required by this AD, unless the AD specifies otherwise.

TABLE 2—SERVICE INFORMATION INCORPORATED BY REFERENCE

Dash 8 Q400 (Bombardier) TR—	Dated—
ALI–55 to Part 2, ''Airworthiness Limitations Items,'' of the Bombardier Dash 8 Q400 Maintenance Requirements Manual (MRM) PSM 1–84–7.	April 19, 2006.
ALI–56 to Part 2, ''Airworthiness Limitations Items,'' of the Bombardier Dash 8 Q400 Maintenance Requirements Manual (MRM) PSM 1–84–7.	April 19, 2006.
ALI–76 to Part 2, ''Airworthiness Limitations Items,'' of the Bombardier Dash 8 Q400 Maintenance Requirements Manual (MRM) PSM 1–84–7.	January 24, 2008.

(1) The Director of the Federal Register approved the incorporation by reference of Dash 8 Q400 (Bombardier) TR ALI–76, dated January 24, 2008, under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The Director of the Federal Register previously approved the incorporation by reference of Dash 8 Q400 (Bombardier) TR ALI–55, dated April 19, 2006; and Dash 8 Q400 (Bombardier) TR ALI–56, dated April 19, 2006; on June 6, 2008 (73 FR 24143, May 2, 2008).

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(4) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

(5) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/*

code_of_federal_regulations/ibr_locations.html.

Issued in Renton, Washington, on November 19, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–28763 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

RAILROAD RETIREMENT BOARD

20 CFR Part 220

RIN 3220–AB62

Removal of Listing of Impairments and Related Amendments

AGENCY: Railroad Retirement Board.

ACTION: Final rule.

SUMMARY: The Railroad Retirement Board removes the Listing of Impairments from its regulations. The Board's Listing of Impairments (the Listings) is out of date and no longer reflects advances in medical knowledge, treatments, and methods of evaluation. These amendments provide public notice as to how the Railroad Retirement Board will determine disability after removal of the Listings.

DATES: This rule will be effective December 4, 2009.

ADDRESSES: Beatrice Ezerski, Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

FOR FURTHER INFORMATION CONTACT: Marguerite P. Dadabo, Assistant General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751–4945, TDD (312) 751–4701.

SUPPLEMENTARY INFORMATION: We remove and reserve the entire Part A and Part B that comprise the Listing of Impairments (the Listings), as well as the introductory paragraphs, in Appendix 1 of Part 220, Title 20, of the Board's regulations. The Listings have been used to evaluate disability under the Railroad Retirement Act (RRA). When the Listings were originally published on March 28, 1991 (56 FR 12980), they conformed to the criteria used to evaluate disability under the Social Security Act. The basis for this conformity is that disability for any ''regular work'' under the RRA is defined by reference as an inability to engage in any ''substantial gainful activity'' as that term is used in the Social Security Act, and courts have held that disability for ''regular employment'' as that term is used in the RRA has the same meaning as disability for ''substantial gainful activity'' as that term is used in the Social Security Act. *See,* for example, *Peppers* v. *Railroad Retirement Board*, 728 F.2d 404 (7th Cir. 1984). For this reason, many of the Board's regulations used to determine disability parallel the regulations of the Social Security Administration in subpart P, part 404 of title 20 [Determining Disability and Blindness].

What Programs Will the Final Rule Affect?

The Board pays benefits based on disability for any regular work to insured employees, surviving spouses and surviving children disabled prior to age 22, as well as benefits based on disability for one's regular railroad occupation to insured employees who meet additional service requirements. The Listing of Impairments has been used in the evaluation of claims based on disability for benefits under the RRA.

How Is Disability Defined?

Disability under the RRA means that an otherwise qualified claimant is unable either to do his or her past regular railroad occupation, or to do any other regular work, as a result of a medically determinable physical or mental impairment, or combination of impairments, expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. The difference in eligibility for an ''occupational'' disability or a disability for any ''regular work'' is based on the employee's years of service or age and his or her current connection to the railroad industry.

How Is Disability Determined?

The Board, in general, follows a sequential method of evaluating disability which takes into consideration the claimant's current work activity, if any, and then considers all medical evidence. If a claimant cannot be found to be disabled based on medical factors alone, the Board then considers vocational factors such as age, education and work experience.

The five steps used to evaluate disability for any regular employment under the Act, set out in section 220.100 of the Board's regulations, parallel the steps in section 404.1520 of the regulations of the Social Security Administration, used to determine disability for a period of disability, disability insurance benefits, child's insurance benefits based on disability and widow(er)'s insurance benefits based on disability for months after 1990.

The first step of that sequence is to determine if the claimant is working and if so, if that work is substantial gainful activity (SGA). If it is, then the claimant is not disabled, regardless of his or her impairments. If the claimant is not working in SGA, the second step is to evaluate the medical severity of the impairment or combined impairments. If the impairment(s) is not so severe that it significantly limits the claimant's ability to do basic work activities, the claim is denied. If it does, and the impairment(s) has lasted or is expected to last for at least 12 months, or is expected to result in death, the third step has been to determine whether the impairment(s) meets or is medically equal to an impairment listed in appendix 1 of that part. If so, the claimant is disabled. It is this step that will be changed by these amendments. If the claimant is not disabled based on medical factors alone, the fourth step is to determine the claimant's residual functional capacity and whether his or her impairment(s) prevents the performance of the physical and mental demands of his or her past relevant work. If the claimant can still perform that work, then he or she is not disabled. If he or she cannot, then the Board determines, at the fifth step, whether there exists other work in the national economy which an individual of the claimant's age, education, work experience and residual functional capacity can be expected to perform. If such work exists, disability is denied. Otherwise disability is allowed.

What Is the Listing?

The Listing of Impairments sets out the medical criteria that have been used to determine whether a claimant's impairment(s) is so severe that he or she is disabled based on medical factors alone. The listing has been considered at the first step of the sequence followed when evaluating a claimant's disability for work in his or her regular railroad occupation, as set out in section 220.13 of the Board's regulations, and at the third step of the sequence followed when evaluating disability for any regular work, as set out in section 220.100. The listing has been in two parts. Part A listed the criteria used to evaluate impairments of individuals age 18 or older. Part B listed the criteria used to evaluate the impairments of children under age 18. Each part of the listing was organized by body systems, and each body system had an introductory text explaining types of evidence and other factors to be considered when evaluating the medical documentation of impairments of that body system for disability. The introductory text was followed by a list of impairments and the specific medical criteria which had to be met or equaled for that impairment to be so severe that

it precluded the performance of any regular work.

How Was the Listing Used?

The Board used the listing to decide whether an individual was disabled or was still disabled. A claimant who was not working for an employer covered under the Act and who was not doing work that was substantial gainful activity, was found to be disabled if his or her impairment(s) met or equaled the medical criteria of a listed impairment.

The listing was not used to deny a claim of disability. If a claimant's impairment(s) was severe, but did not meet or medically equal any of the impairments in the listing, the evaluation process continued on the basis of vocational factors such as the ability to perform past work, age, education, and past work experience. The listing also was not used to determine that disability had ended because an individual's impairment(s) no longer met or equaled a listed impairment, or because the listing or its medical criteria had changed. If a listing changed and entitlement was based on the individual's impairment(s) having met or equaled a listed impairment, the Board continued to use the criteria of the listing in effect at the time of the last favorable decision when conducting a review for continuing disability. If the individual's condition was found to have improved to where his or her impairment(s) no longer medically met or equaled the prior listing, the Board determined whether the medical improvement was related to the individual's ability to work, and considered all circumstances of the case before deciding whether the individual was currently disabled.

What Problem Does This Final Rule Address?

When the Board last published final rules for the listing on March 28, 1991 (56 FR 12980), it contained the same medical criteria as were then in the regulations of the Social Security Administration at Parts A and B of the Listing of Impairments in Appendix 1 to Subpart P, Part 404 of Title 20. This is because disability for ''regular employment'' as that term is used in the RRA, has been held to have the same meaning as disability for ''substantial gainful activity'' as that term is used in the Social Security Act. As such, the criteria used by the Board to determine whether a claimant's impairment(s) is medically so severe that it prevents any regular work at the third step of evaluation for disability under the RRA, should essentially be the same as the standards used at the third step of evaluating disability for any substantial gainful activity under Title II of the Social Security Act. Since 1991, however, SSA has amended its Listing of Impairments to reflect advances in medical knowledge, treatments and methods of evaluation. Amendments include the addition of a 14th body system; the renaming of body systems; the expansion of introductory texts; the removal or addition of listed impairments from body systems; and changes in the specific medical criteria needed to meet some impairments. As a result, the impairments and criteria listed in the Board's regulations for use in determining disability based on medical factors alone no longer conform with the criteria followed by SSA.

How Does This Final Rule Address That Problem?

This final rule will re-establish consistency in the evaluation of impairments of individuals under both Acts. The Board has determined that even regular updating of its Listings would result in only temporary conformity with the criteria in SSA's Listing of Impairments. This is because SSA's medical listing rules for each body system contains a sunset provision of four to eight years in length, to ensure that the criteria used to determine disability reflects changes brought about by continual advancements in medical knowledge, treatments and methods of evaluation.

Furthermore, the Board is prohibited by regulation from incorporating by reference the regulations of the Social Security Administration or any other agency. Section 21.21, CFR Title 1, of the regulations issued by the Administrative Committee of the Federal Register (composed of the Archivist of the United States, an officer of the Department of Justice designated by the Attorney General, the Public Printer, and the Director of the Federal Register) provides that:

- Each agency shall publish its own regulations in full text. Cross-references to the regulations of another agency may not be used as a substitute for publication in full text, unless the Office of the Federal Register finds that the regulation meets any of the following exceptions:
- The reference is required by court order, statute, Executive order or reorganization plan.
- The reference is to regulations promulgated by an agency with the exclusive legal authority to regulate in a subject matter area, but the referencing agency needs to apply those regulations in its own programs.
- The reference is informational or improves clarity rather than being regulatory.
- The reference is to test methods or consensus standards produced by a Federal agency that have replaced or preempted private or voluntary test methods or consensus standards in a subject matter area.
- The reference is to the Department level from a subagency. (1 CFR 21.21(c)).

The Listing of Impairments does not fall within any of the exceptions listed in section 21.21(c).

The Board has therefore decided that the most efficient and cost effective approach is to remove and reserve the entire Appendix 1 to Part 220—Listing of Impairments, parts A and B, and to replace references in Part 220 of the Board's regulations to disability based on an impairment listed in the Listing of Impairments with rules that describe when the Board will find that a claimant is ''medically disabled.'' A definition of the term ''medically disabled'' to mean disability based solely on impairment(s) which are considered to be so medically severe as to prevent a person from doing any substantial gainful activity is set out in amended § 220.110(a), with § 220.110 also discussing the evidence that will be used by the Board in making that determination.

It is not the Board's intent in removing Appendix 1 to change or nullify any administrative ruling or opinion of the Board's General Counsel presently applicable in determining whether an impairment is medically disabling. Section 220.100(b)(3), the third step in evaluating a claim for disability for any regular employment, is amended to *Impairment(s) medically disabling*, and will be based, in part, on ''whether the severity of the impairment(s) would fall within any of the impairments included in the Listing of Impairments as issued by the Social Security Administration and as amended from time to time (20 CFR part 404, subpart P, appendix 1) or whether the impairment(s) meet such other criteria which the agency by administrative ruling of general applicability has determined to be medically disabling.'' Reference to the guidelines in § 220.100(b)(3) have been added to § 220.13(a), the first step when evaluating a claim for occupational disability. Section 220.61(c)(4) has been revised to explain that the elements of a complete examining physician's report will be based in part on the results of testing performed as stated in the Board's directions. Section 220.111, which had discussed medical

equivalence, when a listed impairment did not meet the requirements set forth in the Listing of Impairments, has been removed and reserved as no longer relevant to the determination of disability under the Railroad Retirement Act. Reference to that section has been removed from § 220.114(d)(3). The Board will continue to follow the guidelines on medical equivalence set forth in the regulations of the Social Security Administration at 20 CFR 404.1526 when determining if a claimant is disabled under the Social Security Act for Medicare entitlement. References to impairment(s) which medically meet and/or equal the severity of impairments in the Listing of Impairments have been revised to refer to impairment(s) that is medically disabling in §§ 220.100(b)(4); 220.101(c)(2); 220.101(c)(3); 220.112(e); 220.114(d)(2); 220.120(e); 220.177(c); 220.177(d)(1); 220.178(c)(1); 220.178(c)(3); 220.179(a)(4)(iii); 220.180(b); and 220.180(c). Reference to the Listing as the source of information on new or improved medical techniques considered when determining whether an annuitant is still disabled has been removed, and if an annuitant is found to be no longer disabled for that reason, that finding will be explained to the annuitant when such a determination is made. Reference to the Listings has been removed from § 220.179(a)(4)(i). A spelling error was corrected in § 220.181, and the criteria in examples of permanent impairments where medical improvement is not expected have been clarified in § 220.186.

The Board published the proposed rule on August 1, 2008. (73 FR 44946) and invited comments by September 30, 2008. No comments were received. After the Board submitted a draft final rule to the Office of Management and Budget (OMB), OMB solicited comments from the Social Security Administration (SSA), the Department of Justice, and the Veterans' Administration. SSA submitted two comments concerning the continuing disability review process. The first comment noted that the amendment changes the definition for ''medical improvement related to the ability to work'' when the comparison point decision (CPD) was made at step 3 of sequential evaluation. That comment stated that the substitution of the phrase ''medically disabling'' for ''meets or equals'' may not work for CPDs that were based on meeting or equaling a listing because it removes the need to compare the current severity with the standard used to find disability at the CPD. The second comment stated that the second sentence in section 220.178(c)(1) was unclear as to whether the severity level referred to the current severity or the severity established at the CPD. The Board has reviewed the comments and the amendments to section 220.178(c)(1) and agrees that the second sentence could be confusing. We have modified that sentence to make it clear that in a continuing disability review, the claimant's current severity will be compared to the standard that was used to make the original, or ''comparison point'', decision.

The remainder of the proposed rule is being published as a final rule without change.

The Board, with the concurrence of the Office of Management and Budget, has determined that this rule is not a significant regulatory action within the meaning of Executive Order 12866. Therefore, no regulatory impact analysis is required.

List of Subjects in 20 CFR Part 220

Railroad Retirement, Disability benefits.

■ For the reasons set out in the preamble, the Railroad Retirement Board amends Title 20, Chapter II, Part 220, Determining Disability, as follows:

PART 220—[AMENDED]

■ 1. The authority citation for part 220 continues to read as follows:

Authority: 45 U.S.C. 231a; 45 U.S.C. 231f.

■ 2. In § 220.13 revise paragraph (a) to read as follows:

§ 220.13 Establishment of permanent disability for work in regular railroad occupation.

* * * * *

(a) The Board evaluates the employee's medically documented physical and mental impairment(s) to determine if the employee is medically disabled. In order to be found medically disabled, the employee's impairments must be severe enough to prevent a person from doing any substantial gainful activity. The Board makes this determination based on the guidelines set out in § 220.100(b)(3). If the Board finds that an employee has an impairment which is medically disabling, it will find the employee disabled for work in his or her regular occupation without considering the duties of his or her regular occupation.

* * * * *

■ 3. In § 220.61 revise paragraph (c)(4) to read as follows:

§ 220.61 Informing the examining physician or psychologist of examination scheduling, report content and signature requirements.

* * * * *

(c) * * *

(4) The results of laboratory and other tests (*e.g.,* x-rays) performed according to the requirements stated in the Board's directions to the examining physician or psychologist.

* * * * *

■ 4. In § 220.100 revise paragraphs (b)(3) and (b)(4) to read as follows:

§ 220.100 Evaluation of disability for any regular employment.

* * * * *

(b) * * *

(3) *Impairment(s) is medically disabling.* If the claimant has an impairment or a combination of impairments which meets the duration requirement and which the Board finds is medically disabling, the Board will find the claimant disabled without considering his or her age, education or work experience. In determining whether an impairment or combination of impairments is medically disabling, the Board will consider factors such as the nature and limiting effects of the impairment(s); the effects of the treatment the claimant has undergone, is undergoing, and/or will continue to undergo; the prognosis for the claimant; medical records furnished in support of the claimant's claim; whether the severity of the impairment(s) would fall within any of the impairments included in the Listing of Impairments as issued by the Social Security Administration and as amended from time to time (20 CFR part 404, subpart P, appendix 1); or whether the impairment(s) meet such other criteria which the agency by administrative ruling of general applicability has determined to be medically disabling.

(4) *Impairment(s) must prevent past relevant work.* If the claimant's impairment or combination of impairments is not medically disabling, the Board will then review the claimant's residual functional capacity (*see* § 220.120) and the physical and mental demands of past relevant work (see § 220.130). If the Board determines that the claimant is still able to do his or her past relevant work, the Board will find that he or she is not disabled. If the claimant is unable to do his or her past relevant work, the Board will follow paragraph (b)(5) of this section.

* * * * *

■ 5. In § 220.101 revise paragraphs (c)(2) and (c)(3) to read as follows:

§ 220.101 Evaluation of mental impairments.

* * * * *

(c) * * *

(2) If the claimant's mental impairment(s) is severe, the Board must then determine if it is medically disabling using the Board's prior conclusions based on this procedure (i.e., the presence of certain medical findings considered by the Board as especially relevant to a claimant's ability to work and the Board's rating of functional loss resulting from the mental impairment(s)).

(3) If the claimant has a severe impairment(s), but the impairment(s) is not medically disabling, the Board will then do a residual functional capacity assessment for those claimants (employees, widow(er)s, and children) whose applications are based on disability for any regular employment under the Railroad Retirement Act.

* * * * *

■ 6. Revise § 220.110 to read as follows:

§ 220.110 Medically disabled.

(a) ''*Medically disabled.''* The term ''medically disabled ''refers to disability based solely on impairment(s) which are considered to be so medically severe as to prevent a person from doing any substantial gainful activity. The Board will base its decision about whether the claimant's impairment(s) is medically disabling on medical evidence only, without consideration of the claimant's residual functional capacity, age, education or work experience. The Board will also consider the medical opinion given by one or more physicians employed or engaged by the Board or the Social Security Administration to make medical judgments. The medical evidence used to establish a diagnosis or confirm the existence of an impairment, and to establish the severity of the impairment includes medical findings consisting of signs, symptoms and laboratory findings. The medical findings must be based on medically acceptable clinical and laboratory diagnostic techniques. If the claimant has more than one impairment, but none of the impairments, by themselves, is medically disabling, the Board will review the signs, symptoms, and laboratory findings of all of the impairments to determine whether the combination of impairments is medically disabling. In general, impairments that the Board considers to be medically disabling are:

(1) Permanent;

(2) Expected to result in death; or

(3) Have a specific length of duration.

(b) *Diagnosis of impairments.* A diagnosis of a particular impairment is not sufficient for a finding of medical disability, unless the diagnosis is supported by medical findings that are based on medically acceptable clinical and laboratory techniques.

(c) *Addiction to alcohol or drugs.* If a claimant has a condition diagnosed as addiction to alcohol or drugs, this condition will not, by itself, be a basis for determining whether the claimant is, or is not, disabled. As with any other medical condition, the Board will decide whether the claimant is disabled based on symptoms, signs, and laboratory findings.

§ 220.111 [Removed and Reserved]

■ 7. Remove and reserve § 220.111.

■ 8. In § 220.112 revise paragraph (e) introductory text and Example 1 to read as follows:

§ 220.112 Conclusions by physicians concerning the claimant's disability.

* * * * *

(e) *Medical opinions that will not be considered conclusive nor given extra weight.* The Board will not consider as conclusive nor give extra weight to medical opinions which are not in accord with the statutory or regulatory standards for establishing disability. Thus, opinions that the individual's impairments are medically disabling where the medical findings which are the basis for that conclusion would not support an impairment so severe as to preclude any substantial gainful activity will not be conclusive nor given extra weight. Likewise, an opinion(s) as to the individual's residual functional capacity which is not in accord with regulatory requirements set forth in §§ 220.120 and 220.121 will not be conclusive nor given extra weight.

Example 1: A medical opinion states that a claimant is disabled based on blindness, but findings show functional visual accuity in the better eye, after best correction, of 20/100. That medical opinion would not be conclusive or given extra weight.

* * * * *

■ 9. In § 220.114 remove paragraph (d)(2), redesignate paragraphs (d)(3) and (d)(4) as paragraphs (d)(2) and (d)(3), and revise the newly redesignated paragraphs (d)(2) and (d)(3) to read as follows:

§ 220.114 Evaluation of symptoms, including pain.

* * * * *

(d) * * *

(2) *Decision of whether impairment(s) is medically disabling.* The Board will not substitute the claimant's allegations of pain or other symptoms for a missing or deficient sign or laboratory finding to raise the severity of the claimant's impairment(s) to that of being medically disabling. If the symptoms, signs, and laboratory findings of the claimant's impairment(s) are found by the Board to be so severe as to prevent any substantial gainful activity, the Board will find the claimant disabled. If it does not, the Board will consider the impact of the claimant's symptoms on the claimant's residual functional capacity. (*See* paragraph (d)(3) of this section.)

(3) *Impact of symptoms (including pain) on residual functional capacity.* If the claimant has a medically determinable severe physical or mental impairment(s), but the claimant's impairment(s) is not medically disabling, the Board will consider the impact of the claimant's impairment(s) and any related symptoms, including pain, on the claimant's residual functional capacity. (*See* § 220.120 of this part.)

■ 10. In § 220.120 revise paragraph (e) to read as follows:

§ 220.120 The claimant's residual functional capacity.

* * * * *

(e) *Total limiting effects.* When the claimant has a severe impairment(s), but the claimant's symptoms, signs, and laboratory findings are not medically disabling, the Board will consider the limiting effects of all of the claimant's impairment(s), even those that are not severe, in determining the claimant's residual functional capacity. Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of the claimant's impairment(s) and any related symptoms, the Board will consider all of the medical and non-medical evidence, including the information described in § 220.114 of this part.

■ 11. In § 220.177:

■ a. Amend paragraph (c) by revising the second paragraph of Example 2; and

■ b. Revise paragraph (d)(1).

The revisions read as follows:

§ 220.177 Terms and definitions.

* * * * *

(c) * * *

Example 2: * * *

Medical improvement has occurred because there has been a decrease in the severity of the annuitant's impairments as shown by x-ray and clinical evidence of solid union and his return to full weight-bearing. This medical improvement is related to his ability to work because these findings no longer support an impairment of the severity of the impairment on which the finding that he was medically disabled was based (see § 220.178(c)(1)). Whether or not the annuitant's disability is found to have ended will depend on the Board's determination as to whether he can currently engage in substantial gainful activity.

(d) * * *

(1) Under the law, disability is defined, in part, as the inability to do any regular employment by reason of a physical or mental impairment(s). ''Regular employment'' is defined in this part as ''substantial gainful activity.'' In determining whether the annuitant is disabled under the law, the Board will measure, therefore, how and to what extent the annuitant's impairment(s) has affected his or her ability to do work. The Board does this by looking at how the annuitant's functional capacity for doing basic work activities has been affected. Basic work activities means the abilities and aptitudes necessary to do most jobs. Included are exertional abilities such as walking, standing, pushing, pulling, reaching and carrying, and non-exertional abilities and aptitudes such as seeing, hearing, speaking, remembering, using judgment, dealing with changes in a work setting and dealing with both supervisors and fellow workers. The annuitant who has no impairment(s) would be able to do all basic work activities at normal levels; he or she would have an unlimited functional capacity to do basic work activities. Depending on its nature and severity, an impairment(s) will result in some limitation to the functional capacity to do one or more of these basic work activities. Diabetes, for example, can result in circulatory problems which could limit the length of time the annuitant could stand or walk and can result in damage to his or her eyes as well, so that the annuitant also had limited vision. What the annuitant can still do, despite his or her impairment(s), is called his or her residual functional capacity. How the residual functional capacity is assessed is discussed in more detail in § 220.120. Unless an impairment is so severe that it is deemed to prevent the annuitant from doing substantial gainful activity (*i.e.,* the impairment(s) is medically disabling), it is this residual functional capacity that is used to determine whether the annuitant can still do his or her past work or, in conjunction with his or her age, education and work experience, do any other work.

* * * * *

■ 12. In § 220.178 revise paragraphs (c)(1) and (c)(3) to read as follows:

§ 220.178 Determining medical improvement and its relationship to the annuitant's ability to do work.

* * * * *

(c) * * *

(1) *Previous impairment was medically disabling.* If the Board's most recent favorable decision was based on the fact that the annuitant's impairment(s) at that time was medically disabling, an assessment of his or her residual functional capacity would not have been made. If medical improvement has occurred and the current severity of the prior impairment(s) is no longer medically disabling based on the standard [*see* § 220.100(b)(3)] applied at the time of that decision, the Board will find that the medical improvement was related to the annuitant's ability to work. If the medical findings support impairment(s) that is currently so severe as to be medically disabling, the annuitant is deemed, in the absence of evidence to the contrary, to be unable to engage in substantial gainful activity. If there has been medical improvement to the degree that the impairment(s) is not currently medically disabling, then there has been medical improvement related to the annuitant's ability to work. The Board must, of course, also establish that the annuitant can currently engage in gainful activity before finding that his or her disability has ended.

* * * * *

(3) *Prior residual functional capacity assessment should have been made, but was not.* If the most recent favorable medical decision should have contained an assessment of the annuitant's residual functional capacity (i.e., his or her impairment(s) was not medically disabling) but does not, either because this assessment is missing from the annuitant's file or because it was not done, the Board will reconstruct the residual functional capacity. This reconstructed residual functional capacity will accurately and objectively assess the annuitant's functional capacity to do basic work activities. The Board will assign the maximum functional capacity consistent with an allowance.

Example: The annuitant was previously found to be disabled on the basis that while his impairment was not medically disabling, it did prevent him from doing his past or any other work. The prior adjudicator did not, however, include a residual functional capacity assessment in the rationale of that decision and a review of the prior evidence does not show that such an assessment was ever made. If a decrease in medical severity, i.e., medical improvement, has occurred, the residual functional capacity based on the current level of severity of the annuitant's impairment will have to be compared with his residual functional capacity based on its prior severity in order to determine if the medical improvement is related to his ability to do work. In order to make this comparison, the Board will review the prior evidence and make an objective assessment of the annuitant's residual functional capacity at the time of its most recent favorable medical determination, based on the symptoms, signs and laboratory findings as they then existed.

* * * * *

■ 13. In § 220.179 revise paragraphs (a)(3)(ii) introductory text, (a)(4)(i) introductory text, and the example following paragraph (a)(4)(iii) to read as follows:

§ 220.179 Exceptions to medical improvement.

(a) * * *

(3) * * *

(ii) *How the annuitant will know which methods are new or improved techniques and when they become generally available.* The Board will let annuitants know which methods it considers to be new or improved techniques and when they become available.

* * * * *

(4) * * *

(i) Substantial evidence shows on its face that the decision in question should not have been made (e.g., the evidence in file such as pulmonary function study values was misread or an adjudicative standard such as a medical/vocational rule in appendix 2 of this part was misapplied).

* * * * *

(iii) * * *

Example: The annuitant was previously found entitled to a disability annuity on the basis of diabetes mellitus which the prior adjudicator believed was medically disabling. The prior record shows that the annuitant has ''brittle'' diabetes for which he was taking insulin. The annuitant's urine was 3+ for sugar, and he alleged occasional hypoglycemic attacks caused by exertion. His doctor felt the diabetes was never really controlled because he was not following his diet or taking his medication regularly. On review, symptoms, signs and laboratory findings are unchanged. The current adjudicator feels, however, that the annuitant's impairment clearly is not medically disabling. Error cannot be found

because it would represent a substitution of current judgment for that of the prior adjudicator that the annuitant's impairment was medically disabling. The exception for error will not be applied retroactively under the conditions set out above unless the conditions for reopening the prior decision are met.

* * * * *

■ 14. In § 220.180 revise paragraphs (b) and (c) to read as follows:

§ 220.180 Determining continuation or cessation of disability.

* * * * *

(b) If the annuitant is not engaging in substantial gainful activity, does he or she have an impairment or combination of impairments which is medically disabling? If the annuitant's impairment(s) is medically disabling, his or her disability will be found to continue;

(c) If the annuitant's impairment(s) is not medically disabling, has there been medical improvement as defined in § 220.177(a)? If there has been medical improvement as shown by a decrease in medical severity, see step (d). If there has been no decrease in medical severity, then there has been no medical improvement; (See step (e));

* * * * *

§ 220.181 [Amended]

■ 15. In § 220.181 amend paragraph (i) by removing the word ''not'' and adding in its place the word ''no''.

■ 16. In § 220.186(c) amend the definition of ''Permanent impairment, medical improvement not expected'' by removing the phrase ''§ 220.178(c)(4)'' and adding in its place the phrase ''§ 220.178(c)(3)'' and revise paragraphs (1) through (3) of the definition to read as follows:

§ 220.186 When and how often the Board will conduct a continuing disability review.

* * * * *

(c) * * *

Permanent impairment medical improvement not expected—* * *

(1) Parkinsonian syndrome with significant rigidity, brady kinesia, or tremor in two extremities, which, singly or in combination, result in sustained disturbance of gross and dexterous movements, or gait and station.

(2) Amyotrophic lateral sclerosis, based on documentation of a clinically appropriate medical history, neurological findings consistent with the diagnosis of ALS, and the results of any electrophysiological and neuroimaging testing.

(3) Diffuse pulmonary fibrosis in an individual age 55 or older which reduces FEV1 to 1.45 to 2.05 (L, BTPS) or less depending on the individual's height.

* * * * *

Appendix 1 to Part 220 [Removed and Reserved]

■ 17. Remove and reserve Appendix 1 to Part 220.

Dated: November 20, 2009.

For the Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. E9–28453 Filed 12–3–09; 8:45 am]

BILLING CODE 7905–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1300

[Docket No. DEA–285F]

RIN 1117–AB17

Classification of Three Steroids as Schedule III Anabolic Steroids Under the Controlled Substances Act

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Final rule.

SUMMARY: With the issuance of this final rule, the Deputy Administrator of the Drug Enforcement Administration (DEA) classifies the following three steroids as ''anabolic steroids'' under the Controlled Substances Act (CSA): Boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione. These steroids and their salts, esters, and ethers are schedule III controlled substances subject to the regulatory control provisions of the CSA.

DATES: *Effective Date:* January 4, 2010.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, Ph.D., Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, (202) 307–7183.

SUPPLEMENTARY INFORMATION:

I. Background Information

In a Notice of Proposed Rulemaking (NPRM) (73 FR 22294) published April 25, 2008, the DEA proposed the classification of three steroids as schedule III anabolic steroids under the CSA. These three steroids included boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione. With the publication of this Final Rule, DEA classifies these three steroids as schedule III anabolic steroids. Background information in support of this Final Rule is provided below.

On November 29, 1990, the President signed into law the Anabolic Steroids Control Act of 1990 (Title XIX of Pub. L. 101–647), which became effective February 27, 1991. This law established and regulated anabolic steroids as a class of drugs under schedule III of the CSA. As a result, a new anabolic steroid is not scheduled according to the procedures set out in 21 U.S.C. 811, but can be administratively classified as an anabolic steroid through the rulemaking process by adding the steroid to the regulatory definition of an anabolic steroid in 21 CFR 1300.01(b)(4).

On October 22, 2004, the President signed into law the Anabolic Steroid Control Act of 2004 (Pub. L. 108–358), which became effective on January 20, 2005. Section 2(a) of the Anabolic Steroid Control Act of 2004 amended 21 U.S.C. 802(41)(A) by replacing the existing definition of ''anabolic steroid.'' The Anabolic Steroid Control Act of 2004 classifies a drug or hormonal substance as an anabolic steroid if the following four criteria are met: (A) The substance is chemically related to testosterone; (B) the substance is pharmacologically related to testosterone; (C) the substance is not an estrogen, progestin, or a corticosteroid; and (D) the substance is not dehydroepiandrosterone (DHEA). Any substance that meets the criteria is considered an anabolic steroid and must be listed as a schedule III controlled substance. DEA finds that boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione meet this definition of anabolic steroid and is adding them to the list of anabolic steroids in 21 CFR 1300.01(b)(4).

Anabolic steroids are a class of drugs with a basic steroid ring structure that produces anabolic and androgenic effects. The prototypical anabolic steroid is testosterone. Anabolic effects include promoting the growth of muscle. The androgenic effects consist of promoting the development of male secondary sexual characteristics such as facial hair, deepening of the voice, and thickening of the skin.

In the United States, only a small number of anabolic steroids are approved for either human or veterinary use. Approved medical uses for anabolic steroids include treatment of androgen deficiency in hypogonadal males, adjunctive therapy to offset protein catabolism associated with prolonged administration of corticosteroids, treatment of delayed puberty in boys, treatment of metastatic breast cancer in women, and treatment of anemia associated with specific diseases (*e.g.,*

anemia of chronic renal failure, Fanconi's anemia, and acquired aplastic anemia). However, with the exception of the treatment of male hypogonadism, anabolic steroids are not the first-line treatment due to the availability of other preferred treatment options. DEA is not aware of any legitimate medical use or New Drug Applications (NDA) for the three substances that DEA is classifying as anabolic steroids under the definition set forth under 21 U.S.C. 802(41)(A). Moreover, DEA has not identified any chemical manufacturers currently using these substances as intermediates in their manufacturing process(es).

Adverse effects are associated with the use or abuse of anabolic steroids. These effects depend on several factors (*e.g.,* age, sex, anabolic steroid used, the amount used, and the duration of use). In early adolescence, the use of testosterone and other anabolic steroids that have estrogenic effects can cause premature closure of the growth plates in long bones resulting in a permanently stunted growth. In adolescent boys, anabolic steroid use can cause precocious sexual development. In both girls and women, anabolic steroid use induces permanent physical changes such as deepening of the voice, increased facial and body hair growth, and the lengthening of the clitoris. In men, anabolic steroid use can cause shrinkage of the testicles, decreased sperm count, and sterility. Gynecomastia (*i.e.,* enlargement of the male breast tissue) can develop with the use of those anabolic steroids with estrogenic actions. In both men and women, anabolic steroid use can damage the liver and can cause high cholesterol levels, which may increase the risk of strokes and heart attacks. Furthermore, anabolic steroid use is purported to induce psychological effects such as aggression, increased feelings of hostility, and psychological dependence and addiction. Upon abrupt termination of long-term anabolic steroid use, a withdrawal syndrome may appear including severe depression.

II. Evaluation of Statutory Factors for Classification as an Anabolic Steroid

With the issuance of this Final Rule, DEA is classifying boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione as anabolic steroids under the definition set forth under 21 U.S.C. 802(41)(A). As noted previously, a drug or hormonal substance is classified as an anabolic steroid by meeting the following four definitional requirements: (A) The substance is chemically related to testosterone; (B) the substance is pharmacologically related to testosterone; (C) the substance is not an estrogen, progestin, or a corticosteroid; and (D) the substance is not DHEA.

(A) Chemically Related to Testosterone

To classify a substance as an anabolic steroid, a substance must be chemically related to testosterone. DEA discussed its evaluation of the chemical relationship of boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione in the NPRM published April 25, 2008 (73 FR 22294). A Structure Activity Relationship (SAR) evaluation for each of the substances compared the chemical structure of the steroid to that of testosterone, as substances with a structure similar to that of testosterone are predicted to possess comparable pharmacological and biological activity.

Boldione is also known by the following chemical name: Androsta-1,4-diene-3,17-dione. DEA has determined that the chemical structure of boldione is chemically related to that of testosterone. The chemical structure of boldione differs from testosterone by only the following structural features: A ketone group at carbon 17 and a double bond between the carbon 1 and carbon 2. The human body would be expected to metabolize the ketone group at carbon 17 into a hydroxyl group that is present on testosterone (Payne and Hales, 2004; Peltoketo *et al.,* 1999; Moghrabi and Andersson, 1998). Furthermore, the scientific literature reports that the additional double bond at carbon 1 in boldione does not significantly decrease the anabolic activity of the substance (Vida, 1969). Boldione is an anabolic steroid precursor, being metabolized by the body into boldenone (Galletti and Gardi, 1971; Kim *et al.,* 2006), which is a schedule III anabolic steroid (21 *U.S.C.* 802(41)(A)(vi)).

Desoxymethyltestosterone (DMT) is also known by the following names: 17α-Methyl-5α-androst-2-en-17β-ol; and madol. DEA has determined that the chemical structure of desoxymethyltestosterone is chemically related to testosterone. The chemical structure of desoxymethyltestosterone differs from testosterone by the following four structural features: The lack of a ketone group at the third carbon, a double bond between the second and third carbon, the lack of a double bond between the fourth and fifth carbon, and a methyl group at carbon 17. Each of these four chemical features is known through the scientific literature not to eliminate the anabolic and androgenic activity of the substance (Brueggemeir *et al.,* 2002; Vida, 1969).

19-Nor-4,9(10)-androstadienedione is also known by the following chemical names: 19-Norandrosta-4,9(10)-diene-3,17-dione; and estra-4,9(10)-diene-3,17-dione. DEA has determined that the chemical structure of 19-nor-4,9(10)-androstadienedione is chemically related to testosterone. The chemical structure of 19-nor-4,9(10)-androstadienedione differs from testosterone by the following three structural features: A ketone group at carbon 17, the absence of a methyl group at carbon 19, and a double-bond between carbon 9 and carbon 10. The human body would be expected to metabolize the ketone group at carbon 17 into a hydroxyl group like that present in testosterone (Payne and Hales, 2004; Peltoketo *et al.,* 1999; Moghrabi and Andersson, 1998). Furthermore, the scientific literature reports that both the absence of the methyl group at carbon 19 and the additional double bond in 19-nor-4,9(10)-androstadienedione increase the anabolic activity of the substance (Vida, 1969).

(B) Pharmacologically Related to Testosterone

A substance must also be pharmacologically related to testosterone (*i.e.,* produce similar biological effects) to be classified as a schedule III anabolic steroid. The pharmacology of a steroid, as related to testosterone, can be established by performing one or more of the following androgenic and anabolic activity assays: Ventral prostate assay, seminal vesicle assay, levator ani assay, testicular atrophy assay, gonadotropin suppression assay, and androgen receptor binding and efficacy assays. These assays are described below.

Ventral Prostate Assay, Seminal Vesicle Assay, and Levator Ani Assay: The classic scientific procedure for examining the effects of a steroid as compared to testosterone is to perform the testosterone sensitive assays, ventral prostate assay, seminal vesicle assay, and levator ani assay in rats. Certain male accessory organs (*i.e.,* the ventral prostate, seminal vesicles, and levator ani muscle) specifically need testosterone to grow and remain healthy. Upon the removal of the testes (*i.e.,* castration), the primary endogenous source of testosterone is eliminated causing the atrophy of the ventral prostate, seminal vesicles, and levator ani muscle (Eisenberg *et al.,* 1949; Nelson *et al.,* 1940; Scow, 1952; Wainman and Shipounoff, 1941). Numerous scientific studies have demonstrated the ability of exogenous testosterone administered to rats following castration to maintain the normal weight and size of all three

testosterone sensitive tissues (Biskind and Meyer, 1941; Dorfman and Dorfman, 1963; Kincl and Dorfman, 1964; Nelson *et al.,* 1940; Scow, 1952; Wainman and Shipounoff, 1941). Thus, a steroid with testosterone-like activity will also prevent the atrophy of these three testosterone-dependent tissues in castrated rats.

Testicular Atrophy Assay: Administering testosterone to non-castrated rats causes a decrease in serum levels of gonadotropins (*i.e.,* luteinizing hormone [LH] and follicle stimulating hormone [FSH]) from normal levels. Gonadotropins are pituitary hormones that affect the size and function of the testes. The suppression of these gonadotropins by excess testosterone results in a significant decrease in the size and weight of the testes (Boris *et al.,* 1970; McEuen *et al.,* 1937; Moore and Price, 1938). Accordingly, a steroid with testosterone-like activity will also significantly diminish the size and weight of the testes.

Gonadotropin Suppression Assay: The castration of rats causes a substantial increase in the serum levels of gonadotropins (*i.e.,* LH and FSH) above normal levels due to the removal of the principal source of endogenous testosterone (Gay and Bogdanove, 1969; Swerdloff *et al.,* 1972, 1973; Swerdloff and Walsh, 1973). The administration of testosterone to castrated animals suppresses the increase in the serum levels of gonadotropins (Gay and Bogdanove, 1969; Swerdloff *et al.,* 1972; Swerdloff and Walsh, 1973; Verjans *et al.,* 1974). The administration of anabolic steroids with testosterone-like activity will also prevent this increase in serum levels of LH and FSH.

Androgen Receptor Binding and Efficacy Assay: Androgen receptor binding and efficacy assays are also used to demonstrate that the activity of a steroid is similar to that of testosterone. Testosterone produces its anabolic effects subsequent to binding to and activating the androgen receptor. Different cell-based assays can compare candidate steroids to testosterone for their ability to bind to and activate androgen receptors.

There are several different types of assays used to establish androgen receptor binding and efficacy. In one assay, C3H10T1/2 stem cells express androgen receptors and are used to assess steroids for their ability to bind and activate the androgen receptor (Jasuja *et al.,* 2005a,b; Singh *et al.,* 2003). In these stem cells, the translocation of the androgen receptor to the nucleus of the cell in the presence of the ligand (*e.g.,* testosterone or its active metabolite dihydroxytestosterone) confirms that the ligand bound to the androgen receptor and activated the downstream signaling cascade. When activated, the C3H10T1/2 stem cells differentiate into skeletal muscle cells as demonstrated by the increase in the expression of muscle specific proteins (*i.e.,* myogenic determination transcription factor [MyoD] and myosin heavy chain [MHC]). Another assay uses human breast cancer cells genetically altered to contain a specific reporter gene (*e.g.,* luciferase gene) regulated by androgen receptor activation (Hartig *et al.,* 2002; Wilson *et al.,* 2002). The expression of a bioluminescent protein (*e.g.,* luciferase) signals both androgen receptor binding and activation.

Results of the Androgenic and Anabolic Activity Assays: As discussed in the NPRM, in January 2006, DEA reviewed the published scientific literature for pharmacological data on the anabolic and androgenic activity of boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione using the assays described above. As discussed further below, there was sufficient information on the pharmacology of desoxymethyltestosterone in the reviewed scientific literature to determine that desoxymethyltestosterone is pharmacologically related to testosterone (*i.e.,* produces biological effects similar to those of testosterone). However, the published literature contained insufficient pharmacological data to determine whether boldione and 19-nor-4,9(10)-androstadienedione were pharmacologically related to testosterone. Consequently, as discussed further below and in the NPRM, DEA sponsored pharmacological studies involving several different androgenic and anabolic activity assays to generate the data necessary to make this determination.

Androgenic and anabolic activity assay results indicate that boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione have similar pharmacological activity as testosterone.

Boldione

DEA sponsored a study [1] by the Veteran's Administration Puget Sound Health Care System to determine the anabolic and androgenic effects of boldione in intact and castrated rats (Matsumoto and Marck, 2006). The results of these studies were compared to the results of a study by the same laboratory using a similar protocol to characterize the androgenic and anabolic effects of testosterone (Marck *et al.,* 2003). Boldione administered to castrated male rats by silastic capsules implanted under the skin prevented atrophy of the ventral prostate, seminal vesicles, levator ani muscle, and the rise in serum gonadotropin (LH and FSH) associated with castration. Boldione administration also produced testicular atrophy in intact rats. Another DEA sponsored study [2] at a laboratory at Boston University examined the ability of boldione to bind to the androgen receptor and to cause the differentiation of C3H10T1/2 stem cells into muscle cells (Bhasin, 2005). All of these effects caused by boldione in C3H10T1/2 stem cells were comparable to those of testosterone as established in experiments using the same or similar methodology (Singh *et al.,* 2003). Collectively, the evidence indicates that the pharmacology of boldione is similar to testosterone.

Desoxymethyltestosterone

Desoxymethyltestosterone was administered subcutaneously, orally, or intramuscularly to castrated rats (Dorfman and Kincl, 1963; Kincl and Dorfman, 1964; Nutting *et al.,* 1966). By all three routes of administration, desoxymethyltestosterone prevented the atrophy of ventral prostate, seminal vesicles, and levator ani muscle. Desoxymethyltestosterone also induced the expression of the bioluminescent protein luciferase in CAMA–1 breast cancer cells signaling androgen receptor binding and activation (Ayotte *et al.,* 2006). Collectively, the evidence indicates that the pharmacology of desoxymethyltestosterone is similar to testosterone.

19-Nor-4,9(10)-Androstadienedione

As discussed in the NPRM, DEA sponsored a study [3] by the Veteran's Administration Puget Sound Health Care System to determine the anabolic and androgenic effects of 19-nor-4,9(10)-androstadienedione in intact and castrated rats (Matsumoto and Marck, 2006). The results of these studies were compared to the results of a study by the same laboratory using a similar protocol to characterize the androgenic and anabolic effects of testosterone (Marck *et al.,* 2003). 19-Nor-4,9(10)-

[1] The study by the Veteran's Administration Puget Sound Health Care System may be found at *http://www.regulations.gov* in the electronic docket associated with this rulemaking.

[2] The study by Boston University may be found at *http://www.regulations.gov* in the electronic docket associated with this rulemaking.

[3] The study by the Veteran's Administration Puget Sound Health Care System may be found at *http://www.regulations.gov* in the electronic docket associated with this rulemaking.

androstadienedione administered to castrated male rats by silastic capsules implanted under the skin prevented the atrophy of the ventral prostate, seminal vesicles, levator ani muscle, and the rise in serum gonadotropins (LH and FSH) associated with castration. Another DEA sponsored study at a laboratory at Boston University [4] examined the ability of 19-nor-4,9(10)-androstadienedione to bind to the androgen receptor and to cause the differentiation of C3H10T1/2 stem cells into muscle cells (Bhasin, 2005). 19-Nor-4,9(10)-androstadienedione induced the translocation of the androgen receptor to the nucleus of the C3H10T1/2 stem cells, demonstrating binding affinity and efficacy for the androgen receptor. All of these effects caused by 19-nor-4,9(10)-androstadienedione in C3H10T1/2 stem cells were comparable to those of testosterone as established in experiments using the same or similar methodology (Singh *et al.,* 2003). Collectively, the evidence indicates that the pharmacology of 19-nor-4,9(10)-androstadienedione is similar to testosterone.

(C) Not Estrogens, Progestins, and Corticosteroids

As discussed in the NPRM, DEA has determined that boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione are unrelated to estrogens, progestins, and corticosteroids. DEA evaluated the SAR for each of the substances. The chemical structure of each substance was compared to that of estrogens, progestins, and corticosteroids because the chemical structure can be related to its pharmacological and biological activity. DEA found that the three substances lacked the necessary chemical structures to impart significant estrogenic activity (*e.g.,* aromatic A ring) (Duax *et al.,* 1988; Jordan *et al.,* 1985; Williams and Stancel, 1996), progestational activity (e.g., 17β-alkyl group) (Williams and Stancel, 1996), or corticosteroidal activity (e.g., 17-ketone group or 11β-hydroxyl group) (Miller *et al.,* 2002).

(D) Not Dehydroepiandrosterone

Dehydroepiandrosterone, also known as DHEA, is exempt from control as an anabolic steroid by definition (21 U.S.C. 802(41)(A)). Boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione are not dehydroepiandrosterone and are therefore not exempted from control on this basis.

III. Comments Received

On April 25, 2008, DEA published a NPRM (73 FR 22294) proposing to classify boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione as schedule III anabolic steroids. The proposed rule provided an opportunity for all interested persons to submit their comments on or before June 24, 2008. In response to the NPRM, DEA received one comment from a consulting firm that described itself as ''[assisting] dietary supplement companies in understanding governmental regulations while facilitating their growth.'' These comments are summarized and responded to below.

Desoxymethyltestosterone: The commenter indicated that the scientific literature cited in the NPRM pertaining to desoxymethyltestosterone was sufficient to meet the four criteria that must be satisfied for DEA to designate the steroid as a schedule III anabolic steroid. DEA agrees with this conclusion. Therefore, DEA is placing desoxymethyltestosterone into schedule III as an anabolic steroid as proposed.

Chemical relationship of boldione and 19-nor-4,9(10)-androstadienedione to testosterone: The commenter claimed that DEA failed to show that boldione and 19-nor-4,9(10)-androstadienedione are chemically related to testosterone. The commenter claimed that both steroids were distinctly different from testosterone in that each lacks the 17β-hydroxyl, which is present in testosterone. The commenter noted that DEA did not provide any authority for the claim made that ''the human body would be expected to metabolize the ketone group at carbon 17 into a hydroxyl group that is present on testosterone.''

DEA Response: DEA disagrees with this comment. The presence of the ketone group at carbon 17 in boldione and 19-nor-4,9(10)-androstadienedione is consistent with both steroids being chemically related to testosterone, which has a hydroxyl group instead of a ketone group at carbon 17. The enzyme 17β-hydroxysteroid dehydrogenase is known to be responsible for catalyzing the conversion of the 17-ketone group to a 17β-hydroxyl group in steroids such as androgens and estrogens. This enzyme, in various isoenzymatic forms, has been documented in many body tissues in humans and various animal species (Payne and Hales, 2004; Peltoketo *et al.,* 1999; Moghrabi and Andersson, 1998; Melewich *et al.,* 1981). Considering the wide distribution of this enzyme in tissues of humans and animals, it is expected that this enzyme would convert the 17-ketone group found in boldione and 19-nor-4,9(10)-androstadienedione to the 17β-hydroxyl group, thereby producing boldenone and 19-nor-4,9(10)-androstadiene-3-one-17β-ol. Direct evidence that this conversion takes place comes from two studies showing that boldione is converted to boldenone, a schedule III anabolic steroid, in the human body (Galletti and Gardi, 1971; Kim *et al.,* 2006). Therefore, the presence of the ketone group at carbon 17 in boldione and 19-nor-4,9(10)-androstadienedione is consistent with both steroids being chemically related to testosterone.

DEA-sponsored studies regarding pharmacological relationship: The commenter claimed that the two studies sponsored by DEA were insufficient to justify determining whether boldione and 19-nor-4,9(10)-androstadienedione are pharmacologically related to testosterone.

DEA Response: DEA disagrees with this statement. The study using C3H10T1/2 cells demonstrates the ability of both steroids to act like testosterone in binding and activation of the androgen receptor resulting in protein synthesis and myotube formation. The second study reveals the ability of the steroids to act like testosterone in reversing the effects of castration of the rat on the size of selected androgen-selective organs (ventral prostate, seminal vesicles, levator ani muscle). This particular assay has been used in hundreds of studies within the scientific and industrial community to evaluate steroids for anabolic and androgenic activity similar to that found for testosterone (Vida, 1969). In addition, the effects of these two steroids on LH and FSH levels and testicular size in intact rats is also consistent with producing pharmacological effects similar to those of testosterone. Collectively, both studies demonstrate that boldione and 19-nor-4,9(10)-androstadienedione are pharmacologically similar to testosterone.

DEA-sponsored study at Boston University: The commenter claimed that the pharmacological analysis of boldione and 19-nor-4,9(10)-androstadienedione for androgenic activity using C3H10T1/2 stem cells did not show a pharmacological relationship. According to the commenter, this failure was due to: (1) Failure to obtain a random sample of C3H10T1/2 cells; (2) erroneously assuming that mere binding to an

[4] The study by Boston University may be found at *http://www.regulations.gov* in the electronic docket associated with this rulemaking.

androgen receptor and translocation to the nucleus is sufficient to show androgenic activity; and (3) the lower potency of boldione and 19-nor-4,9(10)-androstadienedione compared to dihydrotestosterone in the assay.

DEA Response: DEA disagrees with these comments. First, to conduct the study it was necessary, as provided in the protocol, to identify batches of C3H10T1/2 cells that had the potential to differentiate into myogenic cells when exposed to anabolic steroids. This was done and verified using the schedule III anabolic steroid dihydrotestosterone as a positive control. Second, this study did not simply examine androgen receptor binding and subsequent translocation of the bound receptor to the nucleus. Instead, with respect to boldione, 19-nor-4,9(10)-androstadienedione, and dihydrotestosterone, the study also demonstrated that this binding and translocation to the nucleus lead to the commitment of these cells to form muscle cells as evidenced by selected protein expression and the creation of myotubes. These various effects have previously been induced by exposure of C3H10T1/2 cells to the schedule III anabolic steroids testosterone, androstenedione, and tetrahydrogestrinone (Singh *et al.,* 2003; Jasuja *et al.,* 2005a,b). The fact that boldione and 19-nor-4,9(10)-androstadienedione were less potent than dihydrotestosterone at producing these effects does not preclude using this information to support the pharmacological similarity of these steroids to testosterone. It simply means that a higher dose of the two steroids is required to produce the effects.

DEA-sponsored study by the Veteran's Administration Puget Sound Health Care System: The commenter also asserted that DEA failed to show in the rat study that boldione and 19-nor-4,9(10)-androstadienedione produced androgenic and anabolic effects, thereby failing to show a pharmacological relationship to testosterone. The commenter indicated that this conclusion was based on the limited weight gain or lack of weight gain found in animals given these steroids compared to control animals not exposed to the steroids. Additionally, the commenter noted as evidence for a failure to demonstrate androgenic activity the statement in the study report that read ''[t]he direct androgenic and anabolic activity of 1,4-androstadien-3,17-dione in sham operated rats is less clear.''

DEA Response: DEA disagrees with this comment. DEA believes that using this assay, both steroids were found to produce pharmacological effects like that of testosterone. Although body weight was recorded in the study, it was not used as an endpoint for determining anabolic or androgenic effects. This was due to the fact that the regulation of body weight is complex, involving, among other factors, food intake, changes in fat mass, and changes in lean body mass. Instead, the androgenic and anabolic effects of both steroids were demonstrated by their ability to reverse the effects of castration of male rats on the size of the ventral prostate, seminal vesicles, and levator ani muscle, all three being androgen sensitive tissues. As discussed in the NPRM, numerous scientific studies have shown that exogenous testosterone administered to castrated rats can reverse the effects of castration on the ventral prostate, seminal vesicles, and levator ani muscle (Biskind and Meyer, 1941; Dorfman and Dorfman, 1963; Kincl and Dorfman, 1964; Nelson *et al.,* 1940; Scow, 1952; and Wainman and Shipounoff, 1941). This particular assay has been used extensively over the years by the scientific community, including the pharmaceutical industry, to evaluate steroids for anabolic and androgenic activity (Vida, 1969). The authors of the DEA sponsored study specifically conclude that ''In summary, we found that, 1,4-androstadien-3,17-dione (A0100) and 4,9-estradien-3,17-dione (E0160) demonstrated both androgenic activity, as evidenced by stimulation of the androgenic tissues (prostate and seminal vesicles) and anabolic activity, as evidenced by stimulation of the levator ani muscle growth in castrated male rats.''

In regard to androgenic activity comment, the commenter did not provide the full statement from the report which reads: ''The direct androgenic and anabolic activity of 1,4-androstadien-3,17-dione in sham operated rats is less clear because of the measured increases in serum T levels that could mediate the androgenic and anabolic activities of 1,4-androstadien-3,17-dione.'' This statement in the report mentioned the possibility that the pharmacological effects (reduction in LH and FSH levels and testes size) of 1,4-androstadien-3,17-dione could result indirectly by metabolism to an active steroid such as testosterone. As noted in the report, it was not possible to determine whether or not 1,4-androstadien-3,17-dione actually metabolized to testosterone or some other substance that cross reacted in the testosterone assay. Regardless of whether 1,4-androstadien-3,17-dione acts directly or serves as a prodrug, it still produced pharmacological effects similar to that of testosterone when administered to rats.

DEA has evaluated the comment received and finds that it does not provide any justification to dispute the determination that boldione, desoxymethyltestosterone and 19-nor-4,9(10)-androstadienedione are anabolic steroids.

IV. Conclusion and Impact of Final Rule

Conclusion

Therefore, based on the above, DEA concludes that boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione meet the CSA definition of ''anabolic steroid'' because each substance is: (A) Chemically related to testosterone; (B) pharmacologically related to testosterone; (C) not an estrogen, progestin, or a corticosteroid; and (D) not DHEA (21 U.S.C. 802(41)(A)). All anabolic steroids are classified as schedule III controlled substances (21 U.S.C. 812(e) schedule III). Once a substance is determined to be an anabolic steroid, DEA has no discretion regarding the scheduling of these substances. As discussed further below, upon the effective date of this Final Rule all requirements pertaining to controlled substances in schedule III pertain to these three substances.

Impact of Classifying These Substances as Anabolic Steroids

The classification of boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione as schedule III anabolic steroids makes these three substances subject to CSA requirements. Any person who manufactures, distributes, dispenses, imports, or exports boldione, desoxymethyltestosterone, or 19-nor-4,9(10)-androstadienedione, or who engages in research or conducts instructional activities with respect to these three substances, must obtain a schedule III registration in accordance with the CSA and its implementing regulations.

As of January 4, 2010, manufacture, import, export, distribution, or sale of boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione, except by DEA registrants, is a violation of the CSA that may result in imprisonment and fines (21 U.S.C. 841 and 960). Possession of these three steroids, unless legally obtained, is also subject to criminal penalties (21 U.S.C. 844).

In addition, under the CSA, these three substances may be imported only

for medical, scientific, or other legitimate uses (21 U.S.C. 952(b)) under an import declaration filed with DEA (21 CFR 1312.18). Importation of these substances will be illegal unless the person importing these substances is registered with DEA as an importer or researcher and files the required declaration for each shipment. An individual who purchases any of these substances directly from foreign companies and has them shipped to the U.S. is considered to be importing even if the steroids are intended for personal use. Illegal importation of these substances is a violation of the CSA that may result in imprisonment and fines (21 U.S.C. 960).

Requirements for Handling Substances Defined as Anabolic Steroids

Effective January 4, 2010, boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione are subject to CSA regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, dispensing, importation, and exportation of a schedule III controlled substance, including the following:

Registration. Any person who manufactures, distributes, dispenses, imports, exports, or engages in research or conducts instructional activities with a substance defined as an anabolic steroid, or who desires to engage in such activities, must be registered to conduct such activities with schedule III controlled substances in accordance with 21 CFR part 1301.

Security. Substances defined as anabolic steroids are subject to schedule III–V security requirements and must be manufactured, distributed, and stored in accordance with 21 CFR 1301.71, 1301.72(b), (c), and (d), 1301.73, 1301.74, 1301.75(b) and (c), 1301.76 and 1301.77.

Labeling and Packaging. All labels and labeling for commercial containers of substances defined as anabolic steroids which are distributed on or after January 4, 2010, shall comply with requirements of 21 CFR 1302.03–1302.07.

Inventory. Every registrant required to keep records and who possesses any quantity of any substance defined as an anabolic steroid is required to keep an inventory of all stocks of the substances on hand pursuant to 21 CFR 1304.03, 1304.04 and 1304.11. Every registrant who desires registration in schedule III for any substance defined as an anabolic steroid shall conduct an inventory of all stocks of the substances on hand at the time of registration.

Records. All registrants are required to keep records pursuant to 21 CFR 1304.03, 1304.04, 1304.05, 1304.21, 1304.22, 1304.23.

Prescriptions. All prescriptions for these schedule III substances or for products containing these schedule III substances are required to be issued pursuant to 21 CFR 1306.03–1306.06 and 1306.21–1306.27. All prescriptions for these schedule III compounds or for products containing these schedule III substances, if authorized for refilling, are limited to five refills within six months of the date of issuance of the prescription.

Importation and Exportation. All importation and exportation of any substance defined as an anabolic steroid must be in compliance with 21 CFR part 1312.

Criminal Liability. Any activity with any substance defined as an anabolic steroid not authorized by, or in violation of, the Controlled Substances Act or the Controlled Substances Import and Export Act occurring on or after January 4, 2010 is unlawful.

Disposal of Anabolic Steroids

Persons who possess substances classified as anabolic steroids and who wish to dispose of them rather than becoming registered to handle them should contact their local DEA Diversion field office for assistance in disposing of these substances legally. DEA Diversion field offices will provide the person with instructions regarding the disposal. A list of local DEA Diversion field offices may be found at *http://www.deadiversion.usdoj.gov.*

Regulatory Certifications

Regulatory Flexibility Act

The Deputy Administrator hereby certifies that this rulemaking has been drafted in accordance with the Regulatory Flexibility Act (5 *U.S.C.* 601–612). This regulation will not have a significant economic impact on a substantial number of small entities. As of August 2008, DEA identified 61 dietary supplements promoted for building muscle and increasing strength that are purported to contain boldione, desoxymethyltestosterone, or 19-nor-4,9(10)-androstadienedione. Seven dietary supplements purport to contain boldione; twenty-three dietary supplements purport to contain desoxymethyltestosterone; and thirty-one dietary supplements purport to contain 19-nor-4,9(10)-androstadienedione. All 61 dietary supplements are marketed and sold on the Internet.

The manufacturers and distributors of the 61 identified dietary supplements purported to contain boldione, desoxymethyltestosterone, or 19-nor-4,9(10)-androstadienedione also sell a variety of other dietary supplements. DEA has identified a substantial number of Internet distributors that sell these dietary supplements. However, these distributors also sell a variety of other nutritional products. DEA did not receive any information regarding the percentage of revenues derived from these dietary supplements. DEA did not receive any comments regarding legitimate uses of these three substances. DEA has not identified any chemical manufacturers that are currently using these substances as intermediates in their manufacturing process(es).

As of August 2008, DEA identified 32 chemical manufacturers and distributors that sell at least one of the three substances. Most of the companies are located in China and sell a variety of steroids. DEA notes that, as the vast majority of entities handling these substances are Internet based, it is virtually impossible to accurately quantify the number of persons handling these substances at any given time. Further, DEA has no information regarding the percentage of revenue these substances constitute for each handler.

DEA has identified five companies based in the U.S. that are DEA registrants that manufacture and/or distribute at least one of these substances as reference products for testing laboratories. DEA notes, upon placement into schedule III, these substances may be used for analytical purposes. These companies are registered with DEA and are already in compliance with the CSA and DEA implementing regulations regarding the handling of schedule III substances.

Executive Order 12866

The Deputy Administrator hereby certifies that this rulemaking has been drafted in accordance with Executive Order 12866 section 1(b). It has been determined that this rule is a significant regulatory action. Therefore, this action has been reviewed by the Office of Management and Budget.

As discussed above, the effect of this rule removes products containing these substances from the over-the-counter marketplace. DEA has no basis for estimating the size of the market for these products. DEA notes, however, that virtually all of the substances are imported. According to U.S. International Trade Commission data, the import value of all anabolic steroids for the first eleven months of 2008 was $2.1 million. These three substances are

a subset of those imports. The value of anabolic steroid imports for the first eleven months of 2008 declined by 28.1 percent over the comparable period in 2007; the quantity imported during the first eleven months decreased by 60.1 percent over the comparable period in 2007. The total market for these products containing these substances, therefore, is probably quite small. Moreover, DEA believes that the importation of these three substances is for illegitimate purposes.

The benefit of controlling these substances is to remove from the marketplace substances that have dangerous side effects and no legitimate medical use in treatment in the United States. As discussed in detail above, these substances can produce serious health effects in adolescents and adults. If medical uses for these substances are developed and approved, the drugs will be available as schedule III controlled substances in response to a prescription issued by a medical professional for a legitimate medical purpose. Until that time, however, this action bars the importation, exportation, and sale of these three substances except for legitimate research or industrial uses.

Executive Order 12988

This regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

Executive Order 13132

This rulemaking does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Paperwork Reduction Act

This rule regulates three anabolic steroids, which are neither approved for medical use in humans nor approved for administration to cattle or other non-humans. Only chemical manufacturers who may use these substances as chemical intermediates for the synthesis of other steroids are required to register with DEA under the CSA. However, DEA has not identified any chemical manufacturers that are currently using these substances as intermediates in their manufacturing process(es). Thus, DEA does not expect this rule to impose any additional paperwork burden on the regulated industry.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate or by the private sector, of $120,000,000 or more (adjusted for inflation) in any one year and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 21 CFR Part 1300

Chemicals, Drug traffic control.

■ For the reasons set out above, 21 CFR Part 1300 is amended as follows:

PART 1300—DEFINITIONS

■ 1. The authority citation for part 1300 continues to read as follows:

Authority: 21 U.S.C. 802, 821, 829, 871(b), 951, 958(f).

■ 2. Section 1300.01 is amended in paragraph (b)(4) by:

■ A. Redesignating paragraphs (b)(4)(xiii) through (b)(4)(lx) as (b)(4)(xiv) through (b)(4)(lxi),

■ B. Adding a new paragraph (b)(4)(xiii),

■ C. Further redesignating newly designated paragraphs (b)(4)(xvii) through (b)(4)(lxi) as (b)(4)(xviii) through (b)(4)(lxii),

■ D. Adding new paragraph (b)(4)(xvii),

■ E. Further redesignating newly designated paragraphs (b)(4)(xlvii) through (b)(4)(lxii) as (b)(4)(xlviii) through (b)(4)(lxiii), and

■ F. Adding new paragraph (b)(4)(xlvii) to read as follows:

§ 1300.01 Definitions relating to controlled substances.

* * * * *

(b) * * *

(4) * * *

(xiii) boldione (androsta-1,4-diene-3,17-dione)

* * * * *

(xvii) desoxymethyltestosterone (17α-methyl-5α-androst-2-en-17β-ol) (a.k.a., madol)

* * * * *

(xlvii) 19-nor-4,9(10)-androstadienedione (estra-4,9(10)-diene-3,17-dione)

* * * * *

Dated: November 20, 2009.

Michele M. Leonhart,

Deputy Administrator.

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[FR Doc. E9–28572 Filed 12–3–09; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0968]

RIN 1625–AA09

Drawbridge Operation Regulation; Automated and Remotely Operated Bridges

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Commander, Ninth Coast Guard District, is identifying all remotely operated or automated drawbridges in his area of responsibility in subpart B of this part. This rule identifies all the remotely operated or automated drawbridges in this district that currently open on signal to navigation. This rule does not revise the operating schedule or conditions for any of the identified drawbridges.

DATES: This rule is effective December 15, 2009.

ADDRESSES: Comments and material received from the public as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2009–0968 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0968 in the ''Keyword'' box, and

then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Lee Soule, Bridge Management Specialist, Coast Guard Ninth District; telephone 216–902–6085, e-mail:*Lee.D.Soule@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B) the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because these identified drawbridges have been previously authorized to operate under an automated on-signal schedule, and this rule does not change how these drawbridges currently operate, or their current operating schedule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because these identified drawbridges have been previously authorized to operate under an automated on-signal schedule, and this rule does not change how these drawbridges currently operate, or their current operating schedule.

Background and Purpose

In the past nine years, various bridge owners have requested that the Coast Guard allow select drawbridges to operate utilizing an automated or remotely operated system. The District Commander determined that these requests to remove on-site drawtender and automate (or allow these drawbridges to be remotely operated) met with the reasonable needs of navigation for each of the respective waterways over which these drawbridges reside. There were no changes to the operating schedule or signaling requirements for any of the bridges affected. This rule is necessary to comply with 33 CFR part 117.42.

Discussion of Rule

On 4 December 2006 the Coast Guard published a final rule in the **Federal Register** [71 FR 70305] that amended the regulatory language in 33 CFR part 117.42. This new language requires that ''* * * a description of the full operation of the remotely operated or automated drawbridges will be added to Subpart B of this part''. In order to comply with our own regulations, the Coast Guard is amending the appropriate sections in Subpart B that will identify and describe the operation of all automated and remotely operated drawbridges under the jurisdiction of the Ninth Coast Guard District.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This rule is not a significant regulatory action because the affected drawbridges have been operating under automation or from a remote location for a number of years and continue to open on signal for vessel traffic.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This action will not have a significant economic impact on a substantial number of small entities for the following reason; this rule does not change the current operation or operating schedule of the drawbridges. It merely identifies these drawbridges as operated automatically or remotely in Subpart B of 33 CFR part 117.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health

Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 117.847(b) to read as follows:

§ 117.847 Ashtabula River

* * * * *

(b) The draw of the Norfolk Southern Bridge, mile 1.5 at Ashtabula, is remotely operated, is required to operate a radiotelephone, and shall open on signal from April 1 through November 30 from 7 a.m. to 11 p.m. At all other times the draw shall open on signal if at least 24 hours notice is given.

■ 3. Revise § 117.851(d) to read as follows:

§ 117.851 Portage River.

* * * * *

(d) The draw of the Norfolk Southern Bridge, Mile 1.5 at Port Clinton, is remotely operated, is required to operate a radio telephone, and shall open on signal. However, from December 1 through April 30, the draw shall open on signal if at least 24 hours notice is given.

■ 4. Revise § 117.853 to read as follows:

§ 117.853 Sandusky Bay

The draw of the Norfolk Southern Bridge, Mile 3.5 at Sandusky, is remotely operated, is required to operate a radiotelephone, and shall open on signal from April 1 through October 31 and from November 1 through November 30 from 8 a.m. to 4 p.m. At all other times, the draw shall open on signal if at least 24 hours notice is given.

■ 5. Amend § 117.1093 to add paragraphs (c)(4) and (d)(4), and to revise paragraph (e)(3) to read as follows:

§ 117.1093 Milwaukee, Menomonee, and Kinnickinnic Rivers and South Menomonee and Burnham Canals.

* * * * *

(c) * * *

(4) The following bridges are remotely operated, are required to operate a radiotelephone, and shall open as noted in this section; St. Paul Avenue, mile 1.21, Clybourn Street, mile 1.28, Highland Avenue, mile 1.97, and Knapp Street, mile 2.14.

(d) * * *

(4) The following bridges are remotely operated, are required to operate a radiotelephone, and shall open as noted in this section; North Plankinton Avenue, mile 1.08, North Sixth Street, mile 1.37, and North Emmber Lane, mile 1.95, all over Menomonee River, and South Sixth Street, mile 1.51 over South Menomonee Canal.

(e) * * *

(3)(i)The draws of all other bridges across the Kinnickkinnick River shall open on signal; except that, from 7:30 a.m. to 8:30 a.m. and 4:30 p.m. to 5:30 p.m. Monday through Saturday except Federal holidays, the draws need not be opened and, from 11 p.m. to 7 a.m., the draws hall open on signal if at least two hours notice is given.

(ii) The South First Street Bridge, mile 1.78, is remotely operated, is required to operate a radiotelephone, and shall open as noted in this section.

* * * * *

Dated: November, 9, 2009.

Peter V. Neffenger,

Rear Admiral, U.S. Coast Guard,Commander, Ninth Coast Guard District.

[FR Doc. E9–28908 Filed 12–3–09; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0829]

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Bradenton Beach, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Seventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Cortez bridge across the Gulf Intracoastal

Waterway, mile 87.4, at Bradenton Beach, FL. The deviation is necessary to facilitate repairs of the bascule leaves of the bridge. This deviation allows the bridge to conduct single-leaf operations while repairs are conducted. A two hour notice for double leaf operations will be required.

DATES: This deviation is effective from 7 a.m. on September 14, 2009 through 7 p.m. on December 31, 2009.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2009–0829 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0829 in the ''Keyword'' box and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Mr. Michael Lieberum, Bridge Branch, Seventh Coast Guard District; telephone 305–415–6744, e-mail *michael.b.lieberum@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: Worth Contracting on behalf of Florida Department of Transportation, has requested a deviation to the regulations of the Cortez bridge across the Gulf Intracoastal Waterway as required by 33 CFR 117.287(d)(1) Cortez (SR 684) Bridge, mile 87.4. The draw shall open on signal, except that from 6 a.m. to 7 p.m., the draw need only open on the hour, 20 minutes after the hour, and 40 minutes after the hour. From January 15 to May 15, from 6 a.m. to 7 p.m., the draw need only open on the hour and half-hour. To facilitate the repair of the bascule leaves, one leaf will be allowed to remain in the closed position upon signal from a vessel, except with a three hour notification to the bridge tender for a double-leaf opening. This deviation effectively reduces the horizontal clearance of 90 feet by half for vessels requiring an opening. Vessels not requiring an opening may pass at anytime. This action will affect a limited number of vessels as the ability to use the full 90 foot horizontal clearance is available with a two hour notification. This action is necessary to allow Worth Contracting to conduct necessary repairs to the bascule leaves safely and efficiently.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: November 6, 2009.

Scott A. Buschman,

Captain, U.S. Coast Guard, Acting Commander, Seventh Coast Guard District.

[FR Doc. E9–28909 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–RO4–OAR–2009–0793; FRL–9089–2]

Approval of Section 112(l) Authority for Hazardous Air Pollutants; Equivalency by Permit Provisions; National Emission Standards for Hazardous Air Pollutants; Plywood and Composite Wood Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: On August 26, 2003, the EPA published in the **Federal Register** a direct final rule to approve the North Carolina Department of Environment and Natural Resource's (NC DENR) equivalency by permit program, pursuant to section 112(l) of the Clean Air Act, to implement and enforce State permit terms and conditions that substitute for the National Emissions Standards for Hazardous Air Pollutants from the pulp and paper industry for the International Paper Riegelwood mill in Riegelwood, North Carolina. Then, on April 12, 2004, the EPA published in the **Federal Register** a direct final rule to amend the August 26, 2003, direct final rule in order to extend its coverage to include an additional four mills in North Carolina. This action is taken to once again amend the August 26, 2003, direct final rule in order to expand the NC DENR equivalency by permit program coverage to include all 32 sources in North Carolina subject to the plywood and composite wood products rule.

DATES: This direct final rule is effective February 2, 2010 without further notice, unless EPA receives adverse comment by January 4, 2010. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–RO4–OAR–2009–0793 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail: page.lee@epa.gov.*

3. *Fax:* 404–562–9095.

4. *Mail:* ''EPA–R04–OAR–2009–0793'', Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

5. *Hand Delivery or Courier:* Lee Page, Air Toxics and Monitoring Branch, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–RO4–OAR–2009–0793. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA

Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lee Page, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9131. Mr. Page can also be reached via electronic mail at *page.lee@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On April 15, 1998, the Environmental Protection Agency (EPA) promulgated the National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry (see 63 FR 18504) which was codified in 40 CFR part 63, subpart S, ''National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry.'' Subsequently, on January 12, 2001, EPA promulgated the National Emission Standard for Hazardous Air Pollutants from the Pulp and Paper Industry (see 66 FR 3180) which has been codified in 40 CFR part 63, subpart MM, ''National Emission Standards for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite and Stand-alone Semi-chemical Pulp Mills.''

On March 4, 2003, the North Carolina Department of Environment and Natural Resources (NC DENR) requested approval of their program to implement and enforce approved alternative title V permit terms and conditions for certain sources in place of the otherwise applicable requirements of subpart S and subpart MM under the equivalency by permit process outlined in 40 CFR section 63.94.

On August 26, 2003, the EPA published in the **Federal Register** a direct final rule to approve the NC DENR equivalency by permit program, pursuant to section 112(l) of the Clean Air Act, to implement and enforce State permit terms and conditions that substitute for subpart S and subpart MM, for the International Paper Riegelwood Mill in Riegelwood, North Carolina.

On February 6, 2004, NC DENR requested that EPA amend the list of approved facilities to implement and enforce approved alternative title V permit terms and conditions in place of the otherwise applicable requirements of subpart S and subpart MM to include four additional mills. This request was approved by EPA and published in the **Federal Register** on April 12, 2004.

On September 21, 2009, NC DENR requested that EPA amend the original equivalency by permit program approval (*i.e.,* the August 26, 2003, program approval) to expand its coverage to all 32 sources subject to the National Emission Standard for Hazardous Air Pollutants-Plywood and Composite Wood Products, as promulgated on July 30, 2004, and codified in 40 CFR Part 63, subpart DDDD. EPA received this request on September 25, 2009.

II. Discussion

Under CAA section 112(l), EPA may approve State or local rules or programs to be implemented and enforced in place of certain otherwise applicable CAA section 112 Federal rules, emission standards, or requirements. The Federal regulations governing EPA's approval of state and local rules or programs under section 112(l) are located at 40 CFR part 63, subpart E (see 65 FR 55810, dated September 14, 2000). Under these regulations, a state or local air pollution control agency has the option to request EPA's approval to substitute alternative requirements and authorities that take the form of permit terms and conditions instead of source category regulations. This option is referred to as the equivalency by permit (EBP) option. To receive EPA approval using this option, the requirements of 40 CFR 63.91 and 63.94 must be met.

The EBP process comprises three steps. The first step (see 40 CFR 63.94(a) and (b)) is the ''up-front approval'' of the state EBP program. The second step (see 40 CFR 63.94(c) and (d)) is EPA review and approval of the state alternative section 112 requirements in the form of pre-draft permit terms and conditions. The third step (see 40 CFR 63.94(e)) is incorporation of the approved pre-draft permit terms and conditions into a specific title V permit and the title V permit issuance process itself. The final approval of the State alternative requirements that substitute for the Federal standard does not occur for purposes of the Act, section 112(l)(5), until the completion of step three.

The purpose of step one, the ''up-front approval'' of the EBP program, is three fold: (1) It ensures that NC DENR meets the 63.91(b) criteria for up-front approval common to all approval options; (2) it provides a legal foundation for NC DENR to replace the otherwise applicable Federal section 112 requirements with alternative, federally enforceable requirements that will be reflected in final title V permit terms and conditions; and (3) it delineates the specific sources and Federal emission standards for which NC DENR will be accepting delegation under the EBP option.

Under §§ 63.94(b) and 63.91, NC's request for EBP program approval was required to include the identification of the sources and the source categories for which the state is seeking authority to implement and enforce alternative requirements, as well as a one time demonstration that the State has an approved title V operating permit program that permits the affected sources. There are no limitations on the number of sources in a source category for which the State can seek authority to implement and enforce alternative requirements.

III. Final Action

After reviewing the request to expand the coverage of NC DENR's EBP program for subpart DDDD, EPA has determined that this request meets all the requirements necessary to qualify for approval under CAA section 112(l) and 40 CFR 63.91 and 63.94. Accordingly, EPA approves NC DENR's request to implement and enforce alternative requirements in the form of title V permit terms and conditions for New South Lumber Company, Inc. Graham Plant, Alamance County, North Carolina; HDM Furniture Industries, Inc., Henredon Furniture Plant 1 & 2, Burke County, North Carolina; Kohler Co., DBA Baker Furniture, Burke County, North Carolina; Bernhardt Furniture Company Plants 3 & 7, Caldwell County, North Carolina; Thomasville Furniture Industries, Inc., Lenoir Plant, Caldwell County, North

Carolina; Kincaid Furniture Company, Inc., Plant No. 1, Caldwell County, North Carolina; Hickory Chair Company, Catawba County, North Carolina; Uniboard USA LLC, Chatham County, North Carolina; Georgia Pacific Whiteville Plant, Columbus County, North Carolina; West Fraser, Inc., Armour Lumber Mill, Columbus County, North Carolina; Weyerhaeuser NR Company, New Bern Lumber Facility, Craven County, North Carolina; Linwood Furniture, Inc., Davidson County, North Carolina; Warvel Products, Inc., Davidson County, North Carolina; Thomasville Furniture Industries, Inc., Plant C/M/W/SB, Davidson County, North Carolina; Lexington Furniture Inc., Plant 5, Davidson County, North Carolina; Stanley Furniture Company, Inc., Graham County, North Carolina; Georgia Pacific, Creedmoor Chip-N-Saw Plant, Granville County, North Carolina; JELD–WEN, Inc., McDowell County, North Carolina; Weyerhaeuser NR Company, Martin County, North Carolina; Jordan Lumber & Supply Co., Montgomery County, North Carolina; Troy Lumber Co., Montgomery County, North Carolina; Unilin Flooring N.V., Montgomery County, North Carolina; West Fraser, Seaboard Lumber Mill, Northampton County, North Carolina; Georgia Pacific Roxboro, Person County, North Carolina; Louisiana Pacific Corp., Roxboro, Person County, North Carolina; Weyerhaeuser Company, Grifton, Pitt County, North Carolina; Vaughan Bassett Furniture Co., Elkin Furniture, Surry County, North Carolina; Weyerhaeuser NR Company, Elkin Facility, Surry County, North Carolina; Georgia Pacific Plywood/OSB/CNS, Dudley, Wayne County, North Carolina; Louisiana Pacific Corp., Roaring River, Wilkes County, North Carolina; and American Drew, Inc., Plant 13, Wilkes County, North Carolina, for subpart DDDD. This action is contingent upon NC DENR including in title V permits, terms and conditions that are no less stringent than the Federal standard. In addition, the requirement applicable to the sources and the ''applicable requirement'' for title V purposes remains the Federal section 112 requirement until EPA has approved the alternative permit terms and conditions and the final title V permit is issued.

The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this Federal Register publication, EPA is publishing a separate document that will serve as the proposal to approve the section 112(l) provisions should adverse comments be filed. This rule will be effective February 2, 2010 without further notice unless the Agency receives adverse comments by January 4, 2010.

If the EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on February 2, 2010 and no further action will be taken on the proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a section 112(l) delegation request that complies with the provisions of the Act and applicable Federal regulations. Thus, in reviewing section 112(l) submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely expands the previous EPA approved State program under section 112(l) and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the action is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 2, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than

file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 63

Administrative practice and procedure, Air pollution control, National Emission Standards for Hazardous Air Pollutants, Hazardous air pollutants.

Dated: November 16, 2009.

J. Scott Gordon,

Acting Regional Administrator, Region 4.

■ Title 40, chapter I, part 63 of the *Code of Federal Regulations* is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

Authority: 42.U.S.C. 7401 *et seq.*

Subpart E—Approval of State Programs and Delegation of Federal Authorities

■ 2. Section 63.99 is amended by adding a new paragraph (a)(34)(iii) to read as follows:

§ 63.99 Delegated Federal authorities.

(a) * * *

(34) * * *

(iii) North Carolina Department of Environment and Natural Resources (NC DENR) may implement and enforce alternative requirements in the form of title V permit terms and conditions for New South Lumber Company, Inc. Graham Plant, Alamance County, North Carolina; HDM Furniture Industries, Inc., Henredon Furniture Plant 1 & 2, Burke County, North Carolina; Kohler Co., DBA Baker Furniture, Burke County, North Carolina; Bernhardt Furniture Company Plants 3 & 7, Caldwell County, North Carolina; Thomasville Furniture Industries, Inc., Lenoir Plant, Caldwell County, North Carolina; Kincaid Furniture Company, Inc., Plant No. 1, Caldwell County, North Carolina; Hickory Chair Company, Catawba County, North Carolina; Uniboard USA LLC, Chatham County, North Carolina; Georgia Pacific Whiteville Plant, Columbus County, North Carolina; West Fraser, Inc., Armour Lumber Mill, Columbus County, North Carolina; Weyerhaeuser NR Company, New Bern Lumber Facility, Craven County, North Carolina; Linwood Furniture, Inc., Davidson County, North Carolina; Warvel Products, Inc., Davidson County, North Carolina; Thomasville Furniture Industries, Inc., Plant C/M/W/SB, Davidson County, North Carolina; Lexington Furniture Inc., Plant 5, Davidson County, North Carolina; Stanley Furniture Company, Inc., Graham County, North Carolina; Georgia Pacific, Creedmoor Chip-N-Saw Plant, Granville County, North Carolina; JELD–WEN, Inc., McDowell County, North Carolina; Weyerhaeuser NR Company, Martin County, North Carolina; Jordan Lumber & Supply Co., Montgomery County, North Carolina; Troy Lumber Co., Montgomery County, North Carolina; Unilin Flooring N.V., Montgomery County, North Carolina; West Fraser, Seaboard Lumber Mill, Northampton County, North Carolina; Georgia Pacific Roxboro, Person County, North Carolina; Louisiana Pacific Corp., Roxboro, Person County, North Carolina; Weyerhaeuser Company, Grifton, Pitt County, North Carolina; Vaughan Bassett Furniture Co., Elkin Furniture, Surry County, North Carolina; Weyerhaeuser NR Company, Elkin Facility, Surry County, North Carolina; Georgia Pacific Plywood/OSB/CNS, Dudley, Wayne County, North Carolina; Louisiana Pacific Corp., Roaring River, Wilkes County, North Carolina; and American Drew, Inc., Plant 13, Wilkes County, North Carolina, for subpart DDDD of this Part-National Emissions Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products. This action is contingent upon NC DENR including, in title V permits, terms and conditions that are no less stringent than the Federal standard. In addition, the requirements applicable to the sources remain the Federal section 112 requirements until EPA has approved the alternative permit terms and conditions and the final title V permit is issued.

* * * * *

[FR Doc. E9–28969 Filed 12–3–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2008–0575, EPA–HQ–SFUND–2008–0576, EPA–HQ–SFUND–2008–0577, EPA–HQ–SFUND–2008–0585, EPA–HQ–SFUND–2008–0580, EPA–HQ–SFUND–2008–0581, EPA–HQ–SFUND–2008–0582, EPA–HQ–SFUND–2008–0583, EPA–HQ–SFUND–2008–0083, FRL–8790–1]

RIN 2050–AD75

National Priorities List, Final Rule No. 46

Correction

In rule document E9–7825 beginning on page 16126 in the issue of Thursday, April 9, 2009 make the following correction:

Appendix B to Part 300 [Corrected]

On page 16134, in Appendix B to Part 300, the table entitled **TABLE 1—GENERAL SUPERFUND SECTION** has been corrected to read as follows:

TABLE 1—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes [a]
*	* * * * *	*	*
FL	Arkla Terra Property	Thonotosassa.	
*	* * * * *	*	*
FL	Raleigh Street Dump	Tampa.	
*	* * * * *	*	*
IN	U.S. Smelter and Lead Refinery, Inc	East Chicago.	
*	* * * * *	*	*
OH	Behr Dayton Thermal System VOC Plume	Dayton.	
*	* * * * *	*	*
OH	New Carlisle Landfill	New Carlisle.	

TABLE 1—GENERAL SUPERFUND SECTION—Continued

State	Site name	City/county	Notes [a]
*	* * * * *	*	*
PA	BoRit Asbetos	Ambler.	
*	* * * * *	*	*
SC	Barite Hill/Nevada Goldfields	McCormick.	
*	* * * * *	*	*
TX	Attebury Grain Storage Facility	Happy.	
*	* * * * *	*	*

[FR Doc. Z9–7825 Filed 12–3–09; 8:45 am]
BILLING CODE 1505–01–D

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Parts 2, 24, 30, 70, 90, 114, 175, and 188

[USCG–2008–1107]

RIN 1625–ZA21

Shipping; Vessel Inspections; Technical and Conforming Amendments

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: This rule makes a non-substantive change to the definition of ''ferry'' in 46 CFR. The purpose of this rule is to incorporate into Coast Guard regulations the statutory definition of ''ferry'' found at 46 U.S.C. 2101(10)(b), as amended by the Coast Guard and Maritime Transportation Act of 2006. This rule will have no substantive effect on ferry vessel owners or operators or other members of the public.

DATES: This final rule is effective December 4, 2009.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2008–1107 and are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to *http://regulations.gov,* inserting USCG–2008–1107 in the ''Keyword'' box, and then clicking ''Search.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LCDR Reed Kohberger, Coast Guard Headquarters, Washington, DC, telephone 202–372–1471, *Reed.H.Kohberger@uscg.mil.* If you have questions on viewing the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–493–0402.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
U.S.C. United States Code

II. Regulatory History

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(3)(B), the Coast Guard finds that good cause exists for not publishing an NPRM for the revision in the rule because it is a non-substantive change. These changes will have no substantive effect on the public beyond what is already required by statute; therefore, it is unnecessary to publish an NPRM because these regulatory revisions are already mandated by law. Notice and public procedures are unnecessary because public comment on this rulemaking will have no effect on the statute that these rules incorporate. This rule does not create any substantive requirements, but merely incorporates a technical change to a statutory definition into the CFR. *See, Gray Panthers Advocacy Committee* v. *Sullivan,* 936 F.2d 1284, 1291 (D.C. Cir. 1991) (when regulations merely restate the statute they implement, notice-and-comment procedures are unnecessary); *Komjathy* v. *National Transportation Safety Bd.,* 832 F.2d 1294, 1297 (D.C.Cir.1987), *cert. denied,* 486 U.S. 1057, 108 S.Ct. 2825, 100 L.Ed.2d 926 (1988) (''The fact that the regulation merely reiterates the statutory language precludes any serious argument that the regulation affects the agency or holders of airman certificates in such a way as to require notice-and-comment procedures pursuant to 5 U.S.C. 553.'') Under 5 U.S.C. 553(b)(3)(A), the Coast Guard also finds that this rule is exempt from notice and comment rulemaking requirements because these provisions involve agency organization, procedures, and practices. This final rule merely restates the revised statutory definition for the inspection and certification of ferry vessels. The Coast Guard already ensures that these vessels comply with the vessel inspection laws and regulations. It is necessary for Coast Guard inspection personnel to be aware of this new statutory mandate and for Coast Guard procedures used by local Coast Guard inspection offices to be modified where necessary to reflect this change in the law. These amendments place this new statutory mandate into Coast Guard regulations that are used by inspection personnel. This rule consists only of corrections and editorial, organizational, and conforming amendments.

The rule is effective immediately notwithstanding 5 U.S.C. 553(d) because it is not a substantive rule.

III. Background and Purpose

We are amending the definition of ''ferry'' in 46 CFR to conform to the statutory definition of ''ferry'' found at 46 U.S.C. 2101(10)(b), which was amended by section 301 of The Coast Guard and Maritime Safety Act of 2006, Public Law 109–241. The amended definition provides that ''*Ferry* means a vessel that is used on a regular schedule—

(1) To provide transportation only between places that are not more than 300 miles apart; and

(2) To transport only —

(i) Passengers; or

(ii) Vehicles, or railroad cars, that are being used, or have been used, in transporting passengers or goods.''

The statutory definition of ferry was further included elsewhere in the Act as a category of passenger vessel or small passenger vessel, both of which already require inspection and certification. See, 46 U.S.C. 2101(22) and (35).

This rule merely conforms to the statutory requirements of defining ferry vessels and including them within the category of passenger vessel or small passenger vessel as appropriate. The existing tables in 46 CFR that describe vessels requiring inspection and certification are being amended to reflect the change in statutory definition.

Discussion of Rule

Subchapters A, H, K, and T of 46 CFR, define the term ''ferry'' and this rule modifies those definitions to conform to the statutory definition and the applicability of the inspection subchapter to ferry vessels. Subchapters A, C, D, I, H, and U of 46 CFR contain tables that describe vessels requiring inspection and certification. This rule incorporates ferry vessels into those tables in the appropriate category of passenger vessel or small passenger vessel in accordance with the statutory change.

IV. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

A. Regulatory Planning and Review

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this rule to be so minimal that a full Regulatory Analysis under the regulatory policies and procedures of DHS is unnecessary. As this rule involves technical and conforming amendments and procedures and non-substantive changes, it will not impose any costs on the public.

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule does not require a general NPRM and, therefore, is exempt from the requirements of the Regulatory Flexibility Act. Although this rule is exempt, we reviewed it for potential economic impact on small entities. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. It is well settled that States may not regulate in categories reserved for regulation by the Coast Guard. It is also well settled, now, that all of the categories covered in 46 U.S.C. 3306, 3703, 7101, and 8101 (design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels), as well as the reporting of casualties and any other category in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, are within the field foreclosed from regulation by the States. (See the decision of the Supreme Court in the consolidated cases of *United States* v. *Locke and Intertanko* v. *Locke,* 529 U.S. 89, 120 S.Ct. 1135 (March 6, 2000).)

Section 301 of The Coast Guard and Maritime Safety Act of 2006, Public Law 109–241, amended the statutory definition of ferry found at 46 U.S.C. 2101(10)(b) to include ferry vessels as a category of passenger vessel or small passenger vessel in the statute. These categories of vessels are required to undergo safety inspections prior to and during subsequent operation of the vessels, including approval of the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of the vessels. Because the States may not regulate within these categories, preemption under Executive Order 13132 is not an issue.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in an expenditure of this magnitude, we do discuss the effects of this rule elsewhere in this preamble.

F. Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

G. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

H. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

I. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the

Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

J. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

K. Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

L. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under section 2.B.2. figure 2–1, paragraph 34(a) and (d), of the Instruction. This rule involves a non-substantive, technical change to conform the regulations to an amended statutory definition found at 46 U.S.C. 2101(10)(b) and the applicability of inspection to ferry vessels. Paragraph 34(a) deals with editorial or procedural regulations and paragraph 34(d) concerns regulations for the inspection of vessels. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects

46 CFR Part 2

Marine safety, Passenger vessels, Water transportation.

46 CFR Part 24

Marine safety, Passenger vessels.

46 CFR Part 30

Marine safety, Passenger vessels.

46 CFR Part 70

Marine safety, Passenger vessels, Water transportation.

46 CFR Part 90

Marine safety, Passenger vessels.

46 CFR Part 114

Marine safety, Passenger vessels, Water transportation.

46 CFR Part 175

Marine safety, Passenger vessels, Water transportation.

46 CFR Part 188

Marine safety, Passenger vessels.

■ For the reasons discussed in the preamble, the Coast Guard amends 46 CFR parts 2, 24, 30, 70, 90, 114, 175, and 188 as set forth below:

Title 46—Shipping

PART 2—VESSEL INSPECTIONS

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 33 U.S.C. 1903; 43 U.S.C. 1333; 46 U.S.C. 2110, 3103, 3205, 3306, 3307, 3703; 46 U.S.C. Chapter 701; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1. Subpart 2.45 also issued under the Act Dec. 27, 1950, Ch. 1155, secs. 1, 2, 64 Stat. 1120 (*see* 46 U.S.C. App. Note prec. 1).

■ 2. Revise Table 2.01–7(a) to read as follows:

§ 2.01–7 Classes of vessels (including motorboats) examined or inspected and certificated.

(a) * * *

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Table 2.01-7(a)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	**Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]**	**Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]**	**Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]**	**Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]**	**Subchapter O--Certain Bulk and Dangerous Cargoes.[10]**
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1)	Motor, all vessels except seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels > 15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 2.01-7(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(2)	Motor, seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All ferries < 100 gross tons carrying more than 6 passengers and all ferries ≥ 100 gross tons that carry at least 1 passenger. iii) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3)	Non-self-propelled vessels < 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry more than 6 passengers and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

(4)	Non-self-propelled vessels ≥ 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	iii) All vessels that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry at least 1 passenger and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

Table 2.01-7(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(5)	Sail.[13] vessels ≤ 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

(6)	Sail.[13] vessels > 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 2.01-7(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]	Vessels inspected and certificated under--			Vessels subject to the provisions of--		
	Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7) Steam, vessels ≤ 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 2.01-7(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels > 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels not covered by columns 2, 3, 6, and 7.	None.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

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Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

1 Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

2 Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171-179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

3 Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

4 Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

5 Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

6 Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

7 The terms "passenger(s)" and "passenger(s)-for-hire" are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

8 Boilers and machinery are subject to examination on vessels over 40 feet in length.

9 Under 46 U.S.C. 441 an oceanographic research vessel "* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * * * Under 46 U.S.C. 443, "an oceanographic research vessel shall not be deemed to be engaged in trade or commerce." If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certificated for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

10 Bulk dangerous cargoes are cargoes specified in table 151.01-10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

11 For manned tankbarges, see § 151.01-10(c) of this chapter.

12 See § 151.01-15, 153.900(d), or 154.30 of this chapter as appropriate.

13 Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

* * * * *

■ 3. Section 2.10–25 is amended by revising the definitions for ''Ferry'', ''Passenger Vessel'', and ''Small Passenger Vessel'', to read as follows:

46 CFR § 2.10–25

§ 2.10–25 Definitions.

* * * * *

Ferry means a vessel that is used on a regular schedule—

(1) To provide transportation only between places that are not more than 300 miles apart; and

(2) To transport only—

(i) Passengers; or

(ii) Vehicles, or railroad cars, that are being used, or have been used, in transporting passengers or goods.

* * * * *

Passenger vessel means a vessel of at least 100 gross tons:

(1) Carrying more than 12 passengers, including at least one passenger for hire;

(2) That is chartered and carrying more than 12 passengers;

(3) That is a submersible vessel carrying at least one passenger for hire; or

(4) That is a ferry carrying a passenger.

* * * * *

Small passenger vessel means a vessel of less than 100 gross tons:

(1) Carrying more than 6 passengers, including at least 1 passenger for hire;

(2) That is chartered with the crew provided or specified by the owner or the owner's representative and carrying more than 6 passengers;

(3) That is chartered with no crew provided or specified by the owner or the owner's representative and carrying more than 12 passengers;

(4) That is a submersible vessel carrying at least one passenger for hire; or

(5) That is a ferry carrying more than 6 passengers.

* * * * *

PART 24—GENERAL PROVISIONS

■ 4. The authority citation for part 24 continues to read as follows:

Authority: 46 U.S.C. 2113, 3306, 4104, 4302; Pub. L. 103–206; 107 Stat. 2439; E.O. 12234; 45 FR 58801; 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1.

■ 5. Revise Table 24.05–1(a) to read as follows:

§ 24.05–1 Vessels subject to the requirements of this subchapter.

(a) * * *

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Table 24.05-1(a)

Method of propulsion, qualified by size or other limitation.[1]	Vessels inspected and certificated under--			Vessels subject to the provisions of--		
	Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels > 15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 24.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(2)	Motor, seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All ferries < 100 gross tons carrying more than 6 passengers and all ferries ≥ 100 gross tons that carry at least 1 passenger. iii) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3)	Non-self-propelled vessels < 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry more than 6 passengers and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

(4)	Non-self-propelled vessels ≥ 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	iii) All vessels that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry at least 1 passenger and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

Table 24.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(5)	Sail.[13] vessels ≤ 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

(6)	Sail.[13] vessels > 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 24.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels ≤ 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 24.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels > 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels not covered by columns 2, 3, 6, and 7.	None.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

1 Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

2 Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171-179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

3 Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

4 Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

5 Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

6 Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

7 The terms "passenger(s)" and "passenger(s)-for-hire" are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

8 Boilers and machinery are subject to examination on vessels over 40 feet in length.

9 Under 46 U.S.C. 441 an oceanographic research vessel "* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * * * Under 46 U.S.C. 443, "an oceanographic research vessel shall not be deemed to be engaged in trade or commerce." If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certificated for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

10 Bulk dangerous cargoes are cargoes specified in table 151.01-10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

11 For manned tankbarges, see § 151.01-10(c) of this chapter.

12 See § 151.01-15, 153.900(d), or 154.30 of this chapter as appropriate.

13 Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

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PART 30—GENERAL PROVISIONS

■ 6. The authority citation for part 30 continues to read as follows:

Authority: 46 U.S.C. 2103, 3306, 3703; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; Department of Homeland Security Delegation No. 0170.1; Section 30.01–2 also issued under the authority of 44 U.S.C. 3507; Section 30.01–05 also issued under the authority of Sec. 4109, Pub. L. 101–380, 104 Stat. 515.

■ 7. Revise Table 30.01–5(d) to read as follows:

§ 30.01–5 Application of regulations—TB/ALL.

* * * * *

(d) * * *

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Table 30.01-5(d)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	**Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]**	**Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]**	**Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]**	**Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]**	**Subchapter O--Certain Bulk and Dangerous Cargoes.[10]**
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1)	Motor, all vessels except seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels > 15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 30.01-5(d) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(2)	Motor, seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All ferries < 100 gross tons carrying more than 6 passengers and all ferries ≥ 100 gross tons that carry at least 1 passenger. iii) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3)	Non-self-propelled vessels < 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry more than 6 passengers and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

(4)	Non-self-propelled vessels ≥ 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	iii) All vessels that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry at least 1 passenger and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

Table 30.01-5(d) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(5)	Sail.[13] vessels ≤ 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

(6)	Sail.[13] vessels > 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 30.01-5(d) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels ≤ 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 30.01-5(d) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels > 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels not covered by columns 2, 3, 6, and 7.	None.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

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Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

1 Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

2 Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171-179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

3 Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

4 Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

5 Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

6 Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

7 The terms "passenger(s)" and "passenger(s)-for-hire" are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

8 Boilers and machinery are subject to examination on vessels over 40 feet in length.

9 Under 46 U.S.C. 441 an oceanographic research vessel "* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * * * Under 46 U.S.C. 443, "an oceanographic research vessel shall not be deemed to be engaged in trade or commerce." If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certificated for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

10 Bulk dangerous cargoes are cargoes specified in table 151.01-10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

11 For manned tankbarges, see § 151.01-10(c) of this chapter.

12 See § 151.01-15, 153.900(d), or 154.30 of this chapter as appropriate.

13 Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

* * * * *

PART 70—GENERAL PROVISIONS

■ 8. The authority citation for part 70 continues to read as follows:

Authority: 46 U.S.C. 3306, 3703; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801; 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1; Section 70.01–15 also issued under the authority of 44 U.S.C. 3507.

■ 9. Revise Table 70.05–1(a) to read as follows:

§ 70.05–1 United States flag vessels subject to the requirements of this subchapter.

(a) * * *

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Table 70.05-1(a)

Method of propulsion, qualified by size or other limitation.[1]	Vessels inspected and certificated under--			Vessels subject to the provisions of--		
	Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels > 15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 70.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(2)	Motor, seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All ferries < 100 gross tons carrying more than 6 passengers and all ferries ≥ 100 gross tons that carry at least 1 passenger. iii) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3)	Non-self-propelled vessels < 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry more than 6 passengers and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

(4)	Non-self-propelled vessels ≥ 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	iii) All vessels that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry at least 1 passenger and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

Table 70.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(5)	Sail.[13] vessels ≤ 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

(6)	Sail.[13] vessels > 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 70.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels ≤ 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 70.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels > 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels not covered by columns 2, 3, 6, and 7.	None.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

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Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

1 Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

2 Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171-179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

3 Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

4 Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

5 Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

6 Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

7 The terms "passenger(s)" and "passenger(s)-for-hire" are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

8 Boilers and machinery are subject to examination on vessels over 40 feet in length.

9 Under 46 U.S.C. 441 an oceanographic research vessel "* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * * * Under 46 U.S.C. 443, "an oceanographic research vessel shall not be deemed to be engaged in trade or commerce." If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certificated for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

10 Bulk dangerous cargoes are cargoes specified in table 151.01-10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

11 For manned tankbarges, see § 151.01-10(c) of this chapter.

12 See § 151.01-15, 153.900(d), or 154.30 of this chapter as appropriate.

13 Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

* * * * *

■ 10. Section 70.10–1 is amended by revising the definitions for ''Ferry'' and ''Passenger vessel'' to read as follows:

§ 70.10–1 Definitions.

* * * * *

Ferry means a vessel that is used on a regular schedule—

(1) To provide transportation only between places that are not more than 300 miles apart; and

(2) To transport only—

(i) Passengers; or

(ii) Vehicles, or railroad cars, that are being used, or have been used, in transporting passengers or goods.

* * * * *

Passenger vessel means a vessel of at least 100 gross tons:

(1) Carrying more than 12 passengers, including at least one passenger for hire;

(2) That is chartered and carrying more than 12 passengers;

(3) That is a submersible vessel carrying at least one passenger for hire; or

(4) That is a ferry carrying a passenger.

* * * * *

PART 90—GENERAL PROVISIONS

■ 11. The authority citation for part 90 continues to read as follows:

Authority: 46 U.S.C. 3306, 3703; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801; 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1.

■ 12. Revise Table 90.05–1(a) to read as follows:

§ 90.05–1 Vessels subject to the requirements of this subchapter.

(a) * * *

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Table 90.05-1(a)

Method of propulsion, qualified by size or other limitation.[1]	Vessels inspected and certificated under--			Vessels subject to the provisions of--		
	Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels > 15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 90.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	**Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]**	**Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]**	**Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]**	**Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]**	**Subchapter O--Certain Bulk and Dangerous Cargoes.[10]**
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(2)	Motor, seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All ferries < 100 gross tons carrying more than 6 passengers and all ferries ≥ 100 gross tons that carry at least 1 passenger. iii) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3)	Non-self-propelled vessels < 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry more than 6 passengers and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

(4)	Non-self-propelled vessels ≥ 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	iii) All vessels that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry at least 1 passenger and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1,11,and12]

Table 90.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(5)	Sail.[13] vessels ≤ 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

(6)	Sail.[13] vessels > 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 90.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	**Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]**	**Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]**	**Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]**	**Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]**	**Subchapter O--Certain Bulk and Dangerous Cargoes.[10]**
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels ≤ 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 90.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels > 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels not covered by columns 2, 3, 6, and 7.	None.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

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Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

1 Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

2 Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171-179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

3 Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

4 Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

5 Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

6 Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

7 The terms "passenger(s)" and "passenger(s)-for-hire" are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

8 Boilers and machinery are subject to examination on vessels over 40 feet in length.

9 Under 46 U.S.C. 441 an oceanographic research vessel "* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * * * Under 46 U.S.C. 443, "an oceanographic research vessel shall not be deemed to be engaged in trade or commerce." If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certificated for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

10 Bulk dangerous cargoes are cargoes specified in table 151.01-10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

11 For manned tankbarges, see § 151.01-10(c) of this chapter.

12 See § 151.01-15, 153.900(d), or 154.30 of this chapter as appropriate.

13 Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

* * * * *

PART 114—GENERAL PROVISIONS

■ 13. The authority citation for part 114 continues to read as follows:

Authority: 46 U.S.C. 2103, 3306, 3703; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. App. 1804; Department of Homeland Security Delegation No. 0170.1; § 114.900 also issued under 44 U.S.C. 3507.

■ 14. Section 114.110 is amended by revising paragraph (a)(3) and adding a new paragraph (a)(4) before the Note to paragraph (a) to read as follows:

§ 114.110 General applicability.

* * * * *

(a) * * *

(3) If a submersible vessel, carries at least one passenger for hire; or

(4) Is a ferry carrying more than 150 passengers, or having overnight accommodations for more than 49 passengers.

* * * * *

■ 15. Section 114.400(b) is amended by revising the definition for ''Ferry'' to read as follows:

§ 114.400 Definitions of terms used in this subchapter.

* * * * *

(b) * * *

''Ferry'' means a vessel that is used on a regular schedule—(1) To provide transportation only between places that are not more than 300 miles apart; and

(2) To transport only—

(i) Passengers; or

(ii) Vehicles, or railroad cars, that are being used, or have been used, in transporting passengers or goods.

* * * * *

PART 175—GENERAL PROVISIONS

■ 16. The authority citation for part 175 continues to read as follows:

Authority: 46 U.S.C. 2103, 3205, 3306, 3703; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. App. 1804; Department of Homeland Security Delegation No. 0170.1; 175.900 also issued under authority of 44 U.S.C. 3507.

■ 17. Section 175.110 is amended by redesignating the ''Note to *§ 175.110'' as ''Note to paragraph (a)'',* revising paragraph (a)(4) and adding paragraph (a)(5) to read as follows:

§ 175.110 General applicability.

* * * * *

(4) If a submersible vessel, carries at least one passenger for hire; or

(5) Is a ferry carrying more than six passengers.

* * * * *

■ 18. Section 175.400 is amended by revising the definition for ''Ferry'' to read as follows:

§ 175.400 Definitions of terms used in this subchapter.

* * * * *

Ferry means a vessel that is used on a regular schedule—

(1) To provide transportation only between places that are not more than 300 miles apart; and

(2) To transport only—

(i) Passengers; or

(ii) Vehicles, or railroad cars, that are being used, or have been used, in transporting passengers or goods.

* * * * *

PART 188—GENERAL PROVISIONS

■ 19. The authority citation for part 188 continues to read as follows:

Authority: 46 U.S.C. 2113, 3306; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801; 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1.

■ 20. Revise Table 188.05–1(a) to read as follows:

§ 188.05–1 Vessels subject to requirements of this subchapter.

(a) * * *

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Table 188.05-1(a)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	**Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]**	**Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]**	**Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]**	**Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]**	**Subchapter O--Certain Bulk and Dangerous Cargoes.[10]**
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1)	Motor, all vessels except seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels > 15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 188.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(2)	Motor, seagoing motor vessels ≥ 300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All ferries < 100 gross tons carrying more than 6 passengers and all ferries ≥ 100 gross tons that carry at least 1 passenger. iii) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3)	Non-self-propelled vessels < 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry more than 6 passengers and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

(4)	Non-self-propelled vessels ≥ 100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	iii) All vessels that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] E) Carry more than 12 passengers on an international voyage. F) Carry at least 1 passenger and are ferries.	All seagoing barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1, 11, and 12]

Table 188.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]	Vessels inspected and certificated under--			Vessels subject to the provisions of--		
	Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(5) Sail.[13] vessels ≤ 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

(6)	Sail.[13] vessels > 700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 188.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels ≤ 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Table 188.05-1(a) (continued)

Method of propulsion, qualified by size or other limitation.[1]		Vessels inspected and certificated under--			Vessels subject to the provisions of--		
		Subchapter D--Tank Vessels.[2]	Subchapter H--Passenger Vessels[2, 3, 4 and 5] or Subchapter K or T--Small Passenger Vessels.[2, 3, and 4]	Subchapter I--Cargo and Miscellaneous Vessels.[2 and 5]	Subchapter C--Uninspected Vessels.[2, 3, 6 7, and 8]	Subchapter U--Oceanographic Vessels.[2, 3, 6 7, and 9]	Subchapter O--Certain Bulk and Dangerous Cargoes.[10]
Column 1		Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7)	Steam, vessels > 19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] ii) All vessels < 100 gross tons that-- A) Carry more than 6 passengers-for-hire whether chartered or not, or B) Carry more than 6 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry more than 6 passengers and are ferries. iii) All vessels ≥ 100 gross tons that-- A) Carry more than 12 passengers-for-hire whether chartered or not, or B) Carry more than 12 passengers when chartered with the crew provided, or C) Carry more than 12 passengers when chartered with no crew provided, or D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] E) Carry at least 1 passenger and are ferries. iv) These regulations do not apply to-- A) Recreational vessels not engaged in trade. B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels not covered by columns 2, 3, 6, and 7.	None.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

1 Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

2 Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171-179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

3 Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

4 Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

5 Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

6 Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

7 The terms "passenger(s)" and "passenger(s)-for-hire" are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

8 Boilers and machinery are subject to examination on vessels over 40 feet in length.

9 Under 46 U.S.C. 441 an oceanographic research vessel "* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * * * Under 46 U.S.C. 443, "an oceanographic research vessel shall not be deemed to be engaged in trade or commerce." If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certificated for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

10 Bulk dangerous cargoes are cargoes specified in table 151.01-10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

11 For manned tankbarges, see § 151.01-10(c) of this chapter.

12 See § 151.01-15, 153.900(d), or 154.30 of this chapter as appropriate

13 Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

* * * * *

Dated: November 23, 2009.

Stefan G. Venckus,

Chief, Office of Regulations and Administrative Law, United States Coast Guard.

[FR Doc. E9–28473 Filed 12–3–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 090508900–91414–02]

RIN 0648–AX75

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic; Red Snapper Closure

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; interim measures.

SUMMARY: This final temporary rule implements interim measures to establish a closure of the commercial and recreational fisheries for red snapper in the South Atlantic as requested by the South Atlantic Fishery Management Council (Council). The intended effect is to reduce overfishing of red snapper while long-term management measures are developed in Amendment 17A to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (Amendment 17A) to end overfishing of red snapper.

DATES: Effective January 4, 2010 through June 2, 2010.

ADDRESSES: Copies of the final regulatory flexibility analysis (FRFA) may be obtained from Karla Gore, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Karla Gore, telephone: 727–551–5753, fax: 727–824–5308, e-mail: *karla.gore@noaa.gov*.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery off the southern Atlantic states is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

On July 6, 2009, NMFS published the proposed temporary rule and requested public comment (74 FR 31906). The rationale for these interim measures is provided in the preamble to the proposed temporary rule and is not repeated here.

Comments and Responses

A total of 1,151 comments were received on the proposed interim rule from the public, state and county agencies, and non-governmental organizations. Of these comments 1,102 expressed general opposition to the proposed interim measures (1 comment included a petition with over 24,000 signatures), and 27 comments expressed general support (1 comment included a petition with 808 signatures). Other comments provided specific concerns related to the interim rule and are addressed below. Twenty-two comments were received that were unrelated to the scope of this action and are therefore not addressed. The following is a summary of the comments received and NMFS' responses.

Economic Comments

Comment 1: Two hundred sixty nine comments were received expressing concern that the management measures proposed in the interim rule would cause economic hardship on the commercial, recreational and for-hire sectors, and would have negative consequences on the tourism industry and affected communities. One hundred forty five comments were received stating that the proposed interim rule would eliminate important recreational opportunities in the southeast and would cause hardship to individuals who enjoy recreational fishing opportunities for relaxation, fun, and family time.

Response: NMFS recognizes the prohibition on the harvest, possession, and sale of red snapper will have immediate, short-term, negative socioeconomic effects on the fisheries and communities of the South Atlantic region. However, the Council was notified by NMFS on July 8, 2008, that red snapper in the South Atlantic region are undergoing overfishing and are overfished according to the current definition of the minimum stock size threshold. The Council must take action to end overfishing within 1 year of receiving notification that a stock is overfished or undergoing overfishing. In March 2009, the Council requested NMFS implement a prohibition on the harvest and possession of red snapper through interim measures, while the Council completes Amendment 17A. NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) to analyze the economic impacts of the proposed rule on small entities, including commercial fishermen, charter vessels, and headboats. A summary of the IRFA was included with the proposed rule. A Final Regulatory Flexibility Analysis (FRFA) accompanies this final rule and considers the comments received on this action. A Regulatory Impact Review has also been prepared that provides analyses of the social and economic impacts of each alternative to the nation and the fishery as a whole. This analysis was also included in the Environmental Assessment (EA) prepared for this action.

The economic analysis indicates the interim rule would have the most negative short-term effects on communities which target red snapper exclusively. The measures proposed in the interim rule, as well as previous and subsequent management measures, are necessary to address overfishing of snapper-grouper species. Without these measures, long-term management of the fishery may become more restrictive to the fishermen and more burdensome on the agency.

The interim rule implements a prohibition on the harvest, possession and sale of red snapper for 180 days (with the possibility of extending the prohibition for an additional 186 days). During this time, fishing for other snapper-grouper species, in accordance with current fishery regulations, would still be allowed.

Comment 2: Fifteen comments were received stating that an economic analysis was needed to determine the level of economic impacts the proposed interim measures would have on the snapper-grouper fishery. One hundred eighty four comments were received that stated the economic analysis that was included in the Environmental Assessment was inadequate.

Response: NMFS believes that an adequate economic analysis has been performed assessing the impacts of the proposed interim measures. An economic analysis on the impacts of the proposed interim rule was included in the EA. NMFS prepared an IRFA to analyze the economic impacts of the proposed rule on small entities, including commercial fishermen, charter vessels and headboats. A summary of the IRFA was included with the proposed rule. A FRFA accompanies this final rule and considers the comments received on this action. A Regulatory Impact Review has also been prepared that provides analyses of the economic benefits and costs of each alternative to the nation and the fishery as a whole. This analysis was included in the EA prepared for this action.

Comment 3: Nineteen comments were received that stated that the proposed interim rule will severely impact the charter (for-hire) fishing sector and will cause the for-hire clients to lose a source of recreational opportunity.

Response: The economic impacts of this interim rule are expected to be greatest in private, charter, and headboat sectors in Florida. On average, red snapper is the third most important species in terms of the number of fish caught on private and charter trips, and the fifteenth most important species in terms of the number of pounds of fish harvested on headboat trips. Thus, most of the historic trips that had previously targeted red snapper would be expected to continue to be taken but would target other species. The negative impacts associated with this interim rule as well as the impacts from previous and future management measures, are necessary to address overfishing of snapper-grouper species. A complete economic analysis of the proposed action can be found in the EA prepared for this action. A FRFA accompanies this final rule and considers the comments received on this action. Without these interim measures, long-term management of the fishery may become more restrictive to fishermen and more burdensome on the agency. Additionally, the action proposed by the interim rule is temporary and will be replaced by long-term management measures analyzed in Amendment 17A, that are intended to end overfishing of red snapper.

Comment 4: Four comments were received on the cumulative impacts of the recently implemented Amendment 16; the red snapper interim rule; Amendment 17B, which will set annual catch limits and accountability measures for snapper-grouper species experiencing overfishing; and Amendment 17A, which will establish long-term management measures for red snapper. The comments indicated the combination of these amendments and management measures will have severe economic and social impacts for the commercial, headboat, charter, and recreational fisheries and their communities.

Response: The cumulative impacts of the interim rule were described and analyzed in the cumulative effects analysis (CEA) of the EA. The CEA takes into consideration past, current and reasonable foreseeable management actions. Amendments 17A and 17B are being developed by the Council, and it is difficult to determine when they will be implemented, if approved by the Secretary of Commerce. At this time, it is not possible to determine the economic and social impacts from these draft amendments. However, Amendments 17A and 17B will include a cumulative effects analysis, as did those recently implemented (i.e. Amendment 16, Amendment 15B). Furthermore, the management measures in Amendments 17A and 17B will consider the effects of management measures being implemented through other amendments to the FMP.

Comment 5: Seventeen comments were received that stated the proposed interim measures would result in looking to foreign markets for our fresh seafood supply rather than purchasing seafood locally.

Response: According to commercial logbook trip reports from 2003–2007, red snapper was the primary source of trip revenue on an average of 163 trips per year, and a lesser source of trip revenue on 1,222 trips per year. Most of the trips in which red snapper was not the primary source of trip revenue are expected to remain profitable even when the harvest of red snapper is prohibited. With a 6-month closure, a 1.41–percent reduction in net operating revenue would be expected. Therefore, the proposed interim measures would not be expected to cause an increased dependence on foreign markets to supplement fresh seafood supply.

Data Comments

Comment 6: One hundred seventy six comments were received stating that the data used to make the overfishing determination are flawed. Specific comments regarding the nature of the ''flawed'' data suggested the data used in the assessment were old; release mortality was estimated based on one study involving 31 fish from one trip conducted in the Gulf of Mexico; release mortality estimates used in the assessment are based on bad data; recreational data from the Marine Recreational Fisheries Statistics Survey (MRFSS) are unreliable; and the science and statistical models that were used to generate management actions failed peer reviews of the National Academy of Science. Many individuals suggested the interim rule should not be approved and NMFS should wait until better data become available before making any management decisions.

Response: A new stock assessment was completed for red snapper through the Southeast Data, Assessment and Review(SEDAR) process in 2008 using data through 2006. The assessment (SEDAR 15) found that the South Atlantic red snapper stock is overfished and currently undergoing overfishing. Data used for the assessment consisted of records of commercial catches provided by dealer and fishermen reports since the 1940s, headboat fishery catch records from the Southeast Headboat Survey since 1972, and recreational catch records from the MRFSS since 1981. Also included are U.S. Fish and Wildlife Service recreational fisheries surveys from 1960, 1965, and 1970. Landings and effort information are provided by dealer and fishermen reports and surveys. Information on catch lengths and ages is provided by fishing port sampling programs that support the catch statistics programs. Information on biological characteristics, such as age, growth, and reproduction, is provided by various research studies. All of the data used in the assessment are described in the SEDAR 15 red snapper stock assessment report available on the SEDAR Web site at *http://www.sefsc.noaa.gov/sedar/*. The SEDAR Web site also provides extensive supporting documentation that describes data collection programs and research findings.

SEDAR is a cooperative Fishery Management Council process initiated in 2002 to improve the quality and reliability of fishery stock assessments in the South Atlantic, Gulf of Mexico, and US Caribbean. SEDAR is managed by the Caribbean, Gulf of Mexico, and South Atlantic Regional Fishery Management Councils in coordination with NMFS and the Atlantic and Gulf States Marine Fisheries Commissions. SEDAR seeks improvements in the scientific quality of stock assessments and greater relevance of information available to address existing and emerging fishery management issues. SEDAR emphasizes constituent and stakeholder participation in assessment development, transparency in the assessment process, and a rigorous and independent scientific review of completed stock assessments. SEDAR is organized around three workshops. The first is a data workshop where datasets are documented, analyzed, and reviewed and data for conducting assessment analyses are compiled. The second is an assessment workshop where quantitative population analyses are developed and refined and population parameters are estimated. The third is a review workshop where a panel of independent experts reviews the data and assessment and recommends the most appropriate values of critical population and management quantities. All SEDAR workshops are open to the public. Public testimony is accepted in accordance with each Council's Standard Operating Procedures. Workshop times and locations are noticed in advance through the **Federal Register**.

The data and models used in the red snapper stock assessment were not subject to peer reviews by the National Academy of Science. The findings and conclusions of each SEDAR workshop

are documented in a series of reports, which were ultimately reviewed and discussed by the Council and their Science and Statistical Committee (SSC). The stock assessment found red snapper is experiencing overfishing and is overfished. At its June 2008 meeting, the SSC determined the results of the red snapper assessment are based upon the best available science. Additionally, the Southeast Fisheries Science Center certified the red snapper environmental assessment and proposed management measures are based upon the best available science.

SEDAR 15 evaluated findings from numerous studies to estimate release mortality of red snapper. One of the studies reviewed at the data workshop provided discard information for many snapper-grouper species on multiple trips during a 6-month period in the South Atlantic, which included 73 red snapper; 31 of which were released. After examining the results from the many different release mortality studies, the expert scientific opinion at the SEDAR 15 red snapper data workshop recommended the release mortality should be set at 40 percent (a range of 30 to 50 percent to account for uncertainty) for the recreational sector, and 90 percent (a range of 80 to 100 percent to account for uncertainty) for the commercial sector. Discard mortality was evaluated through sensitivity runs and did not result in any significant changes in the fishing mortality or abundance estimates.

Comment 7: One hundred eighty four comments were received that indicated the red snapper fishing in the South Atlantic during the last few years is ''better than ever before'' and management measures appear to be working. Since the stock appears to be doing so well, commenters stated the data used to make the overfishing determination are flawed.

Response: Management measures may be partially responsible for the increase in red snapper landings since the size and bag limits were implemented for red snapper in 1992. However, this increase is quite small compared to large reductions in landings that occurred prior to 1992. Many fishermen have testified during public hearings and scoping meetings that they are catching more red snapper in recent years, especially those fishing off the coast of Georgia and northeast Florida. Observations by fishermen are confirmed by landings data showing a spike in the regulatory discards in 2007 and a doubling of the landed catch in 2008, which suggests a strong year class appears to have entered the fishery.

Red snapper are vulnerable to overfishing because they live for more than 50 years. They grow quickly during the first 10 years of life reaching 20 inches (50.8 cm) total length by age three. Therefore, a very strong year class in 2005 or 2006 could result in a large number of red snapper greater than 20 inches (50.8 cm) total length in 2009. Furthermore, some red snapper greater than 20 lb (9.07 kg) would not be unexpected since the stock assessment indicated there were strong year classes in 1998 and 1999 and red snapper approach their maximum size by age 10. Older fish are generally represented by larger size classes; however, due to the rapid growth of red snapper, and because red snapper approach their maximum size by age 10, length is not always a good indicator of age. For example, a 5-year-old fish can range in length from 13 inches (33.02 cm) total length to 32 inches (81.28 cm) total length; while the age of a 32–inches (81.28–cm) total length red snapper can range from 5 to more than 50 years.

Despite good recruitment, the age structure of the population remains truncated. Red snapper live to at least 54 years of age, but the assessment indicates only a small percentage of the population was estimated to be age 10 or older in recent years. Furthermore, samples provided by fishermen in 2009 also indicates most of the red snapper they were catching were young fish. Therefore, there is a need to protect this strong year class and future year classes to help the stock rebuild more quickly.

Red snapper are being caught before they become old enough to reach their peak reproductive and biomass levels. Although the 20–inch (50.8–cm) size limit (currently in place) allows some fish to spawn before they become vulnerable to harvest, these younger, mostly first-time spawners are less productive and weigh much less than the older and heavier fish.

Comment 8: One comment stated the stock assessment wrongly assumes that the red snapper population was ''virgin'' or in an ''unfished condition'' beginning in 1945. Records indicate that the red snapper stock has been commercially fished and shipped to large cities as early as 1879.

Response: While the stock assessment uses data from 1945 onward, it does not disregard the fact that the red snapper fishery likely operated prior to 1945. Scientists at the SEDAR 15 data workshop for the red snapper stock assessment were in agreement that the red snapper stock was operating at a level of ''light exploitation'' by 1945. The assessment assumed fishing for red snapper was taking place in 1945 and provides landings going back as far as 1927. The assessment assumed that in 1945, the population was at 75 percent of a virgin or unfished population.

Comment 9: One comment was received stating that NMFS failed to accurately characterize the proper locations of the spawning aggregations. Methods to measure spawning aggregations on a routine basis need to be developed such as commercial and recreational fishing boats as platforms for acoustic surveys and sub-sampling acoustic targets.

Response: The Southeast Fisheries Science Center (SEFSC) is developing a fishery independent monitoring plan designed for all snapper-grouper species including red snapper. The plan will consider a broad range of methods to track changes in the snapper-grouper stocks and characterize aspects of life history and behavior, including documenting locations of spawning aggregations, and hopefully a better understanding of the spatial dynamics of many snapper-grouper species. There are grant opportunities for fishermen to conduct research such as those proposed. At the Federal level in the South Atlantic, there are opportunities for funding through the Cooperative Research Program (CRP), Marine Fisheries Initiative (MARFIN), and Saltonstall-Kennedy (S-K), which traditionally utilize varying levels of industry collaboration with scientific investigators. CRP has the most industry involvement by design. For further information regarding these projects visit *http://sero.nmfs.noaa.gov/grants/grants.htm*.

Comment 10: Three comments stated the SEDAR 15 stock assessment results seem to indicate large red snapper ''age 10 and older are practically non-existent in the population.'' However, in the past several months fishermen have landed and analyzed the otoliths of red snapper that are older than 10-years. NMFS estimated a total of only 5,000 large red snappers from North Carolina to the Florida Keys. It would not be possible to find red snapper older than age 10 if the stock assessment information from NMFS is accurate.

Response: The SEDAR 15 assessment predicted a small proportion of the landed red snapper are greater than age 10, but it does not indicate fish greater than age 10 are non-existent. There is variability in the age estimates from the stock assessment. However, both the assessment and the recent samples provided by fishermen indicate the red snapper population is dominated by individuals under the age of 10. Given that the population is capable of reaching age 50 or greater, this is a sign

of sustained and persistent overfishing. The assessment predicts, and samples provided by fishermen indicate, there are currently some 9- and 10-year-old red snapper; however, both the assessment and recent samples provided by fishermen indicated there are some 10- to 20-year-old fish but there are few 20-, 30-, and 40-year-old fish. Encountering increasing numbers of fish age 10 to 12 in 2009 is not unexpected because the 1997–1999 year classes estimated in the stock assessment were the last strong year classes prior to the recent 2005–2006 strong year class. In a healthy red snapper population, a greater proportion of red snapper would be expected to be older than 10 years than what has been estimated by the assessment or illustrated in recent samples collected by fishermen. The assessment supports that the size limit helped the population improve, but it is still a long way from being recovered.

Comment 11: Three commenters stated that the dockside sampling in the important Mayport, FL area has been severely deficient. Further, age sampling was biased towards smaller fish since most of the samples were obtained from recreational fishermen. The commenters suggested the deficiency calls into question the validity of the entire data set used in SEDAR 15 assessment that produced the finding of a truncated fish population.

Response: Otolith-based age data used in the SEDAR 15 red snapper stock assessment were provided by NMFS and the South Carolina Department of Natural Resources (SCDNR). NMFS data were collected from the U.S. South Atlantic commercial (n=1,208) and recreational fisheries (n=5,099) during 1977 2006. Approximately 80 percent of the otoliths processed by NMFS were from north Florida including the area of Mayport, FL. SCDNR data were collected from 1980 2006 and included samples from the U.S. South Atlantic commercial fishery (n = 612) as well as the SCDNR's Marine Resources Monitoring Assessment and Prediction (MARMAP) fishery-independent survey (n = 405). SCDNR obtained samples from red snapper caught throughout the South Atlantic (FL to NC) with approximately 25 percent of the commercial samples from north Florida. The proportion of fishery-dependent samples obtained from the commercial (24 percent) and recreational (76 percent) sectors is similar to the percentage of red snapper harvested in the commercial (25 percent) and recreational (75 percent) sectors during 2004–2008. The combined samples yielded a total of 7,324 red snapper age estimates. Red snapper are currently being sampled from north Florida by the SEFSC.

Comment 12: One comment was received stating that a document provided at the data workshop for the Gulf of Mexico red snapper stock assessment indicated that red snapper are capable of moving large distances. This demonstrates an intermixing potential of red snapper from the two different Council regions. Genetic differences between the Gulf of Mexico and the United States east coast regions were not considered in the South Atlantic red snapper assessment.

Response: Genetic differences between red snapper harvested in the Gulf of Mexico and South Atlantic were discussed at the SEDAR 15 red snapper data workshop and are addressed in the SEDAR 15 stock assessment. Information provided in the stock assessment indicates there is no published evidence to date for separate Gulf of Mexico and Atlantic coast genetic populations. The assessment cites a study which concludes that red snapper constitute a single genetic population from Yucatan Peninsula, to the northern Gulf of Mexico, to the east coast of Florida. However, tagging studies conducted in the Gulf of Mexico provide no evidence of red snapper movement between the Gulf of Mexico and the Atlantic coast and supports management of red snapper in two regions as separate stocks.

Comment 13: Five commenters stated that the red snapper stock assessment should be redone and address the issues raised by Dr. Frank Hester including availability of older/larger red snapper to fishing gear (selectivity). These points concern: lack of a dome-shaped selectivity function for the recreational sector; additional estimates of natural mortality; lack of fecundity data available for the assessment; use of Virtual Population Analysis (VPA) instead of a forward projection model to determine stock status; and use of data from the Fish and Wildlife Survey (FWS).

Response: The SEDAR 15 stock assessment assumed a flat-topped selectivity for the recreational sector where red snapper become more available to fishing gear in the first few years as they grow and then remain equally available to fishing gear for the remainder of their life. Dr. Hester indicated the assessment should consider that older/larger red snapper might not be as easily caught by recreational fishing gear as younger/smaller fish (i.e. dome-shaped selectivity). In response to Dr. Hester's comment, the SEFSC conducted three sensitivity runs for the SEDAR 15 red snapper stock assessment that included variations of dome-shaped selectivity. The first sensitivity run, assumed no red snapper older than age 10 were caught by fishing gear throughout the time period addressed by the assessment (1945 to 2006). This is not a realistic sensitivity run because fishermen have caught red snapper greater than age 10. In the second application, the shape from the first sensitivity run was applied to both headboat and general recreational fishing in the early time period (1945 1983), and in later periods (1984 1991 and 1992 2006), and dome-shaped selectivities were estimated (separately for each period) where the ability to catch red snapper gradually decreased as fish got older. The third application was similar to the second, but differed by applying the estimated selectivity of the middle time period to the early time period. Under all three sensitivity runs, red snapper was overfished and experiencing overfishing; however, the magnitude of harvest reduction differed among the runs. The SEDAR 15 review workshop considered flat-topped selectivity, where all older/larger fish could be caught by fishing gear, as most likely for the commercial sector because commercial fishermen have an economic incentive to catch large fish, and the commercial sector fishes in depths and areas where the oldest and largest red snapper exist. Commercial fishermen also fish in waters deeper than where red snapper occur, suggesting that the complete depth range of red snapper is covered by this sector. Anecdotal information from reports from fishermen off the coast of northeast Florida suggests that larger red snapper tend to move inshore during June to September into depths as shallow as 60 to 90 ft (18.3 to 27.4 m), which further supports a flat-topped selectivity because larger red snapper would be available to recreational fishermen who fish close to shore. Comparison of the age structure in the commercial and recreational sectors reveals almost identical selectivity patterns, suggesting dome-shaped selectivity might not be appropriate for the recreational sector because it appears that older larger red snapper are as available to the recreational sector as for the commercial sector, for whom flat-topped selectivity seems likely.

Natural mortality of red snapper was estimated using several methods and is documented in the SEDAR 15 report. Natural mortality of red snapper was estimated to be 0.078 using the regression model reported by Hoenig (1983). Natural mortality was also

estimated using a variety of models based on von Bertalanffy growth or reproductive parameters. The SEDAR 15 data workshop recommended the Lorenzen age-specific model for estimates of natural mortality for Ages 1+.

The stock assessment used available life history information relying on mature biomass as a measure for reproductive potential. Fecundity data are seldom available for snapper-grouper stocks and, therefore, have been infrequently used in stock assessments.

SEDAR seldom uses VPA because VPA models require a complete catch-age input and apply an assumption that the catch is measured without error. Most stocks managed by the Council have only a short or intermittent time series of age observations adequate for constructing catch at age, and it is widely accepted that key catch sectors have considerable error in their catch estimates. The forward projection model as used in SEDAR 15 for red snapper is state of the art and has been extensively reviewed by independent peer review panels.

An examination of the red snapper age and length composition indicated that the population was already impacted by fishing by the time the biological sampling began in the 1970s. The most likely explanation for this is the large catches occurring prior to the 1970s, which is supported by the fact that the highest recorded commercial catches of red snapper occurred during the 1950s and 1960s. Both commercial and recreational red snapper fisheries were operating prior to the 1970s; however, information on the recreational catch levels for this time period is uncertain. The only estimate of recreational catches during this period comes from the FWS data. At the SEDAR 15 assessment workshop, the panel recognized that recreational fishing occurred prior to the 1970s and that including the FWS data improved model performance in terms of fit and residual patterns. As a result, the SEDAR assessment workshop decided to include the FWS data in the analysis. However, appreciating the uncertainty associated with the historical recreational catch of red snapper, sensitivity runs of the stock assessment model were also conducted and analyzed by the SEDAR 15 assessment workshop participants. These sensitivity runs included assumptions of: (1) very low recreational catches, and (2) half of the values from the FWS survey. The inclusion or exclusion of the FWS data did not impact the SEDAR assessment workshop's conclusions on the stock's status.

Comment 14: Two comments stated that a huge source of mortality is ''regulatory discards'' caused by the Council increasing the minimum size from 12–inches (30.5 cm) total length to 20 inches (50.8 cm) total length in 1992. The main cause of the post-release mortality is due to hooking injuries for red snapper below minimum sizes according to the 2004 Burns et al. study.

Response: NMFS recognizes that the discard mortality of red snapper is high. The Council is developing alternative long-term management measures in Amendment 17A that consider release mortality of red snapper and minimizing injuries due to hooking.

Comment 15: Three commenters stated that the SEDAR process should be more open and inclusive, including making working documents available on the website, encouraging better stakeholder participation through invitation or announcement, using more modeling choices from the ''NMFS toolbox'' for comparative purposes, and utilizing a truly independent review from a group like the National Research Council. Additionally, the SEFSC head scientist should attend every SEDAR workshop to help improve the work effort.

Response: SEDAR is a cooperative Fishery Management Council process initiated in 2002 to improve the quality and reliability of fishery stock assessments in the South Atlantic, Gulf of Mexico, and US Caribbean. SEDAR is managed by the Caribbean, Gulf of Mexico, and South Atlantic Regional Fishery Management Councils in coordination with NMFS and the Atlantic and Gulf States Marine Fisheries Commissions. SEDAR seeks improvements in the scientific quality of stock assessments and greater relevance of information available to address existing and emerging fishery management issues. SEDAR emphasizes constituent and stakeholder participation in assessment development, transparency in the assessment process, and a rigorous and independent scientific review of completed stock assessments. SEDAR is organized around three workshops. The first is a data workshop where datasets are documented, analyzed, and reviewed and data for conducting assessment analyses are compiled. The second is an assessment workshop where quantitative population analyses are developed and refined and population parameters are estimated. The third and final is a review workshop where a panel of independent experts reviews the data and assessment and recommends the most appropriate values of critical population and management quantities. All SEDAR workshops are open to the public. Public testimony is accepted in accordance with each Council's Standard Operating Procedures. Workshop times and locations are noticed in advance through the **Federal Register**.

Comment 16: One comment was received stating that the MARMAP offshore sampling program is deficient in that it is conducted in a random manner. The red snapper sampling program failed to sample at artificial reef locations, at marine protected areas or any marine closed area. To only sample the natural bottom area produces a distorted, truncated assessment.

Response: The SEDAR 15 red snapper data workshop considered several indices of population abundance from fishery-dependent and fishery-independent sources for use in the forward projection stock assessment model. The SEDAR 15 stock assessment for red snapper did not use an abundance index from the MARMAP offshore fishery-independent sampling program. The fishery-independent MARMAP program has been sampling snapper-grouper species in offshore waters of the South Atlantic since 1972. However, red snapper has been sampled in low numbers by MARMAP sampling gear. Therefore, the data workshop recommended MARMAP gear types not be used to develop an index of abundance for red snapper off the southeastern U.S. Gear types and sampling methodology used by MARMAP are not specifically designed to sample red snapper populations. Instead, they are intended to monitor abundance of those snapper-grouper species available to the gear types. The MARMAP program employs a random-stratified sampling design that includes artificial reef and marine protected areas. If samples are not collected randomly from a population then the sampling design would be deficient, population estimates would be biased, and the program would not be scientifically sound. The SEFSC is developing a fishery-independent monitoring program specifically designed to sample snapper-grouper species including red snapper.

Comment 17: One commenter stated that weak and strong spawning stocks are a fact of life that management does not recognize. Identifying the spawning stocks, estimating their biomass and age structure, and documenting their fidelity in time and space are keys to fitting the management to the fishery in the future.

Response: Management for species such as red snapper is usually based on the results of stock assessments. Stock assessments take into account year class variability, and there are data suggesting a recent strong year class of red snapper. By implementing management measures to protect this strong year class, rebuilding of the red snapper stock would likely be enhanced.

Other Comments

Comment 18: Five comments were received that stated that NMFS should make an effort to explain the current regulations and future proposed regulations to the affected fishery participants.

Response: NMFS communicates with constituents regarding proposed new fishing regulations using the Council process, which includes public Council meetings and public comment periods. NMFS also communicates with constituents about the current regulations via regular mail, email, **Federal Register** notices, and websites.

Comment 19: Seventy comments were received stating that the commercial fisheries are responsible for the overfishing of red snapper, and management measures should be focused on the commercial fisheries rather than the recreational fisheries. Some fishermen reasoned that recreational fishermen do not contribute to overfishing of red snapper due to recreational bag limits which allow only two fish per person and therefore do less damage to the stock than the commercial fishermen.

Response: The stock assessment indicates red snapper is overfished and experiencing overfishing. While the recreational bag limits exist to restrict the number of red snapper taken by recreational fishermen, the number of red snapper taken by the recreational sector in 2008 was far more than the amount taken by the commercial fleet. Commercial catch is responsible for about 20 to 25 percent of the total red snapper landings. Therefore, overfishing would continue if management measures were only applied to the commercial sector. The measures proposed in the interim rule would apply to the commercial and recreational sectors to address overfishing of red snapper while long-term measures are being developed in Amendment 17A to the FMP.

Comment 20: Two hundred fifty eight comments were received stating that the rock shrimp fishery is responsible for the overfishing of red snapper, and management measures should be focused on the commercial fisheries rather than the recreational fisheries.

Response: No evidence exists that the rock shrimp trawl fleet captures juvenile red snapper. During 2001–2006, NMFS initiated observer coverage of the rock shrimp fishery in the U.S. southeastern Atlantic (east coast). The primary objective of this effort was to estimate catch rates for target and non-target species. Results of this study show rock shrimp comprised 16 percent of the total catch, followed by dusky flounder (13 percent), inshore lizardfish (11 percent), iridescent swimming crab (7 percent), longspine swimming crab (6 percent), spot (5 percent), blotched swimming crab and brown shrimp (3 percent each), and horned searobin and brown rock shrimp (2 percent each). Other finfish species were rock sea bass, bluespotted searobin, red goatfish, and lefteye flounder. Most of these species, with the exception of spot, are not targeted in commercial or recreational fisheries. A summary of bycatch issues for the rock shrimp fishery and a report on the above study can be found in Amendment 7 to the FMP for the Shrimp Fishery of the South Atlantic Region.

Confusion about rock shrimp bycatch likely results from evidence that the fishery for penaeid shrimp (pink, white, and brown shrimp) in the Gulf of Mexico catches a high level of juvenile red snapper. However, no evidence exists that the penaeid shrimp fishery in the South Atlantic has the same level of red snapper catch. In fact, the Southeast Area Monitoring and Assessment Program-South Atlantic Coastal Survey has not caught any red snapper during shallow water trawl studies since 2007, and no more than two red snapper in any year during 1995–2007.

Comment 21: Seventy comments were received stating that commercial longline fishermen were responsible for red snapper overfishing. The commenters indicated that commercial longline should be eliminated.

Response: Landings of red snapper taken with bottom longline is extremely small. Use of bottom longline for fishermen who possess Federal commercial snapper-grouper permits is restricted to depths greater than 50 fathoms or 300 ft (91.44 m) where red snapper infrequently occur. Furthermore, harvest by bottom longline fishermen who possess Federal commercial snapper-grouper permits is restricted to deep water snapper-grouper species with a small allowable bycatch limit for other snapper-grouper species.

Bottom longline gear is also used in the shark fishery. Analysis of observed bottom longline sets from 1994 to 2006 suggested the impact on the snapper-grouper fishery with this gear type appeared to minimal. During the 13 year period, there were observed catches of tilefish and grouper species with shark bottom longline; however, there were no observed catches of red snapper with this gear.

Pelagic longline is used in deeper water where red snapper do not occur and usually does not impact the bottom. Therefore, it is unlikely that snapper-grouper bottom longline, shark bottom longline, or pelagic longline has much impact on the status of red snapper.

Comment 22: Eighty-three comments received were in opposition to a complete closure of red snapper but would consider alternate management measures.

Response: An option was considered to close red snapper for four months. However, NMFS determined that a prohibition on the harvest, possession and sale of red snapper for 180 days (with the possibility of extending the prohibition for an additional 186 days) would reduce red snapper overfishing better than a four-month closure. The action proposed by the interim rule is temporary and will be replaced by long-term management measures intended to end overfishing of red snapper, which are currently under development in Amendment 17A to the FMP.

Comment 23: Three comments were received stating that spear-fishermen should be allowed to continue fishing for red snapper.

Response: Under interim measures, NMFS must implement measures to reduce overfishing. In this case, a prohibition on the harvest, possession and sale of red snapper will result in the greatest benefit to the red snapper population. However, even this reduction will not be enough to end overfishing of red snapper. The intent of the interim rule is to reduce fishing pressure on red snapper to the greatest extent possible while long-term measures to end overfishing of the stock are being developed in Amendment 17A to the FMP.

Comment 24: Eight comments were received stating the desire to ''Keep Ocean Fishing.''

Response: The interim rule would implement a prohibition on the harvest, possession and sale of red snapper for 180 days (with the possibility of extending the prohibition for an additional 186 days). During this time fishing for other species (i.e. snapper-grouper, mackerel, etc.), in accordance with current regulations, would still be allowed.

Comment 25: Six comments were received expressing support for the creation of new artificial reefs to create more habitat for red snapper.

Response: Some studies suggest artificial reefs increase populations of red snapper while others suggest artificial reefs attract fish. As artificial reefs are usually well marked, the stock could be negatively impacted by making large concentrations of red snapper more accessible to fishermen. Regardless, the reduction needed to end overfishing and rebuild the population of red snapper would not be achieved by only creating more artificial reefs.

Comment 26: Ten comments were received stating that the red snapper interim rule would not be needed if there was better enforcement of current regulations.

Response: Red snapper is undergoing overfishing and requires a substantial reduction in total removals to end overfishing. Even with 100–percent compliance with the current regulations, fishing pressure on red snapper could not be reduced to the level needed to end overfishing. New management measures are needed to address overfishing.

Comment 27: One comment was received that stated the measures proposed in the interim rule would not be enough to help the red snapper population and more comprehensive measures would be needed.

Response: The Council is currently developing Amendment 17A to the FMP, which will include long-term management measures sufficient to end overfishing of red snapper in the South Atlantic. Amendment 17A will analyze a suite of management measures, including some that are more restrictive than those being implemented by the interim rule.

Comment 28: Forty two comments were received stating that the proposed interim measures are political in nature and are being encouraged by big business (fish farms, foreign fisheries) or non-governmental organizations.

Response: The interim rule was requested by the Council to reduce overfishing of red snapper while long-term management measures to prevent overfishing and rebuild the overfished stock are being developed in Amendment 17A. This interim rule is necessary to comply with the mandates of the Magnuson-Stevens Act to prevent overfishing and rebuild overfished stocks. Some non-governmental organizations did support implementation of the rule as being necessary to prevent overfishing. No comments on the interim rule were received from businesses such as fish farms, and no comments were received from representatives of foreign fisheries.

Comment 29: Seventeen comments stated foreign fishing would target red snapper in domestic waters if fishing for red snapper is prohibited.

Response: The Magnuson-Stevens Act empowers the Federal government to regulate fishing in the exclusive economic zone (3 to 200 nautical miles offshore). After February 28,1977, no foreign fishing is authorized within the exclusive economic zone unless foreign fishing meets certain criteria specified in the Magnuson-Stevens Act.

Comment 30: Two comments pointed to the unchecked lionfish population as a possible cause for the red snapper population decline.

Response: The SEFSC is conducting studies on the lionfish population and the effects that it may have on other species. At this time there is no conclusive evidence that the lionfish population has an impact on the red snapper population.

Comment 31: Five comments were received that oppose the recreational regulations and point to the unchecked populations of goliath grouper as they prey on red snapper and other snapper-grouper species.

Response: The goliath grouper populations are thought to be increasing and likely prey on snapper-grouper species. However, there is no evidence that goliath grouper populations are having a negative impact on populations of red snapper.

Comment 32: Ten comments were received requesting NMFS to abandon the interim rule and take more time to develop and analyze long-term management measures in Amendment 17A.

Response: The Council was notified by NMFS on July 8, 2008, that red snapper in the South Atlantic region are undergoing overfishing and are overfished according to the current definition of the minimum stock size threshold. The Council must take action to end overfishing within one year of receiving notification that a stock is overfished or undergoing overfishing. In March 2009, the Council requested that NMFS implement a prohibition on the harvest and possession of red snapper through interim measures. Amendment 17A is currently under development and will include long-term management measures to end overfishing of red snapper in the South Atlantic. However, Amendment 17A is not expected to be completed until 2010, and there is currently a strong year class of red snapper in the South Atlantic that appears to be experiencing heavy fishing pressure. Protection of the large year class would help to rebuild the stock more quickly.

Comment 33: One comment was received stating an amendment to the Magnuson-Stevens Act should be made to ''untie the hands of fishery managers.''

Response: NMFS is mandated to manage the Federal fisheries through requirements specified by the Magnuson-Stevens Act. Any changes to the Magnuson-Stevens Act would need to be made by Congress.

Classification

The Administrator, Southeast Region, NMFS, (RA) determined that the interim measures this final temporary rule will implement are necessary for the conservation and management of the South Atlantic red snapper fishery. The RA has also determined that this final temporary rule is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws.

This final temporary rule has been determined to be not significant for purposes of E.O. 12866.

NMFS prepared a FRFA, as required by section 604 of the Regulatory Flexibility Act, for this final temporary rule. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant issues raised by public comments on the IRFA, NMFS' responses to those comments, and a summary of the analysis completed to support the action. A copy of the full analysis is available from NMFS (see **ADDRESSES**). A summary of the FRFA follows.

The purpose of this interim rule is to reduce red snapper overfishing while long-term management measures are developed and implemented. The Magnuson-Stevens Act provides the statutory basis for this interim rule.

No public comments were received that raised specific issues on the IRFA. However, 454 comments were received on the general economic analysis conducted for the EA of the proposed interim rule. Some of these comments address issues that are germane to the Regulatory Flexibility Act (RFA), while others do not. However, while the RFA pertains to specific economic questions, there is a logical connection between all economic issues and the nuances of which comments are and which are not germane to the RFA are not always obvious to the public. In recognition of these considerations, all of the economic comments are addressed here.

Four hundred and forty-one of the comments expressed concern over the magnitude of the likely economic effects of the interim rule; 12 comments asserted that no economic impact study of the expected effects of the proposed action had been conducted; one comment stated the analysis was inadequate because it concentrated on

changes in net operating revenues and ignored the ''collective impact to the support infrastructure''; two comments stated that the analysis was inadequate because it was based on ''two charter boats out of the Gulf''; and one comment stated the estimate of lost income for headboats was inadequate because it was based on 2003–2007 data, a time period during which ''included unusually bad weather and a recession.'' Also, although not enumerated, several of the 454 comments on the general economic analysis stated that the interim rule would completely prevent them from fishing.

The RFA requires an assessment of the expected direct impacts of regulatory action on small entities. As explained in the IRFA and provided below in this classification summary, the small entities that are expected to be directly affected by this interim rule include only commercial and for-hire fishing vessels. While different types of shore-side businesses are also expected to be affected, these would be indirect effects of the interim rule and, as such, do not fall under the requirements of the RFA. However, the expected indirect effects of the interim rule on affected entities were discussed in the EA. The EA also contained estimates of the expected change in consumer surplus to recreational anglers. While these would be direct effects, anglers are not small entities as defined by the RFA and, as a result, these effects were not included in the IRFA, nor are they further addressed in this summary.

Details of the expected economic effects of this interim rule on small entities are provided below. In summary, commercial vessels that traditionally harvest red snapper are expected to have their net operating revenues (NOR), trip revenues minus non-labor trip costs, reduced by an average of $450 per vessel as a result of the implementation of the interim rule for 6 months, or a total of $1,300 if the interim rule is in effect for a full year. Comparable figures for headboats are $58,7000 and $132,000, respectively, and $800 and $1,400 for charter vessels. On average, the expected reduction in NOR is expected to represent a small portion of total NOR for commercial and charter vessels because red snapper comprised, on average from 2003–2007, only approximately 3.7 percent of total ex-vessel revenues by commercial vessels with recorded landings of red snapper harvest, and available data indicate that red snapper is targeted by less than one half of one percent of charter anglers. Some individual commercial or charter vessels are expected, however, to be more dependent on red snapper, and experience greater than average losses.

Target information for fishermen on headboats is not available and, as discussed below, the estimates of expected reductions in NOR for this sector equate to what would occur if all headboat angler trips (defined as angler days) for vessels in Georgia and northeast Florida are cancelled. In reality, total cancellation of all trips is not expected because most fishermen do not target specific species, other species would continue to be available, and research has indicated a general willingness to fish for other species when anglers are faced with zero bag limits for individual species. Nevertheless, actual trip cancellation cannot be reasonably projected, and the estimates of potential losses reflect 100 percent of the average NOR for the respective vessels during the relevant period of closure. As such, they represent a worst-case scenario. While not explicitly stated, business failure of affected vessels would be expected if substantial trip cancellation occurs.

An appropriate model to quantify indirect shore-side effects was not available at the time the proposed interim rule was prepared, nor is one currently available. As a result, these effects were only discussed in a qualitative manner, with the conclusion that shore-side effects would be dependent on actual rates of trip cancellation, but may be exacerbated by other economic effects that stem from other recent fishery regulations and the larger economic recession that has been in effect. The absence of quantitative estimates, however, did not preclude or affect the ability to rank the alternatives. In summary, NMFS does not expect the adverse economic effects on the commercial fishery and associated businesses to be cumulatively substantial due to the relatively minor status of the fishery. With regards to the recreational sector, NMFS agrees that, while the net adverse effects of the interim rule will depend on the amount of actual trip cancellations by for-hire (charter and headboat) and private anglers, which target and harvest data does not suggest will be substantial, the possibility of large, localized reductions in effort, expenditures, and associated economic activity exists. However, given the condition of the resource, other alternatives that would achieve the necessary biological goals while imposing lower economic costs were not available.

As demonstrated by the information presented above, an economic analysis of the expected effects of the proposed interim rule was conducted, and NMFS disagrees with statements that no economic impact analysis was conducted. Although the Magnuson-Stevens Act uses the term ''economic impacts,'' NMFS guidelines interpret this language as ''economic effects'' and does not require a specific type of analysis. The analysis conducted for the proposed interim rule examined the expected change in net economic benefits, consistent with a benefit-cost analysis framework (which is the recommended technique in formal economic analysis of Federal regulations), as measured by NOR for fishing businesses and consumer surplus for anglers, rather than the effects of changes in expenditure flows through shore-side businesses and communities. Examination of the effects of changes in these expenditure flows is commonly referred to as ''economic impact analysis.'' However, while measures of these effects are informative, they represent the potential distributional effects of changes in expenditures (changes in potential jobs supported, taxes generated, total sales, etc.) and not changes in net economic benefits. These models also do not capture business profitability or allow the determination of actual business success or failure. Finally, a model to estimate the effects of changes in these expenditure flows was not available. An examination of the effects of the interim rule, and all fisheries rules, on changes in the NOR of shore-side businesses is informative to the management process, similar to the analysis of effects on fishing vessels. However, cost and revenue data for even the most directly affected businesses, such as fish dealers and bait and tackle shops, is unavailable.

The discussion in the previous two paragraphs also addresses the comment that the analysis was inadequate because it concentrated on NOR. The assessment requirements are that relevant economic effects be evaluated either quantitatively or qualitatively, to the extent possible using available information, sufficient to inform the process and support the identification of the alternative that achieves the regulatory objective at the lowest economic cost. NMFS believes that those requirements have been met by the current analysis.

With regards to the comment that the base years used in the analysis of the headboat sector was inappropriate, while the average annual amount of headboat effort from 2003–2007 in the areas examined, approximately 51,000 angler days, is less than the average for 1998–2002, approximately 55,000 angler days, headboat effort, while variable

from year to year, has exhibited a declining trend (the 1993–1997 average was approximately 60,000 angler days, while that of 1988–1992 was approximately 97,000 angler days). Further, the general and continuing economic downturn does not support expectations that increased headboat effort would be probable. As a result, compelling evidence does not exist to justify the use of a higher estimate of base economic activity (angler effort), and even use of the 2003–2007 average annual headboat effort estimates may result in the over-estimation of likely effects.

Claims that the analysis was based on ''two charter boats out of the Gulf'' are unfounded. As discussed in the EA, the methodology employed in the assessment followed the methodology employed in the evaluation of the expected economic effects of the closure of the recreational red snapper fishery in the Gulf of Mexico in 2008. That assessment built upon previous work conducted in support of Amendment 27 to the Reef Fish Fishery Management Plan of the Gulf of Mexico and which utilized information from a number of sources, the most relevant of which were two research studies that collectively covered the for-hire industry from Texas through North Carolina; cost and returns data collected as an add-on to the Marine Recreational Fisheries Statistics Survey For-hire Survey, which was collected from for-hire vessels in Louisiana through Florida (both coasts); and a survey and model that examined changes in angler target behavior and benefits under alternative management scenarios. Thus, the information utilized was drawn from several sources, was certified by the SEFSC as the best scientific information available and was appropriate for application to the interim rule.

Finally, comments that the interim rule would prevent recreational anglers from fishing exaggerate the scope of the rule. Under this interim rule, or any rule that establishes a zero bag limit, only the ability to fish for and retain red snapper is affected. No restriction on continued fishing for other species would be imposed. Fishing for other species, and the enjoyment it brings, could continue. Children could continue to experience the joys of learning how to fish, be taught the environmental ethics of catch and release, and other species could be retained for consumption. All that would be lost under the interim rule would be the benefits associated with the targeting, retention, and consumption of red snapper. While some portion of an angler's enjoyment is understandably associated with the retention and consumption of certain species, much of the enjoyment, and possibly most for many anglers, is expected to be associated with the act of simply fishing and catching fish, with sufficient satisfaction remaining when fish must be released to justify continued fishing. Thus, all customary trips could continue (in number, with appropriate change in target behavior) under the closure. Only those trips for which red snapper target and consumptive needs dominate the benefit stream would be expected to be cancelled. These trips are expected to be few compared to the total number of trips in the affected area, resulting in fewer reductions in expenditures, revenues, and economic activity in associated shore-side businesses. These considerations apply for recreational trips of all types, regardless of whether they are private, charter, or headboat trips. As a result, claims that the interim rule will prevent recreational anglers from fishing, resulting in substantial reductions in economic activity and widespread business failure appear exaggerated.

Because of the responses provided here and to other issues raised by public comment on other aspects of the proposed interim rule, as detailed in the Comments and Responses section of the preamble, no changes were made in the final interim rule as a result of such comments.

This interim rule is expected to directly impact commercial fishing and for-hire operators. The Small Business Administration has established size criteria for all major industry sectors in the U.S. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. For a for-hire business, the other qualifiers apply and the annual receipts threshold is $7.0 million (NAICS code 713990, recreational industries).

From 2003–2007, an average of 220 vessels per year were permitted to operate in the commercial snapper-grouper fishery and recorded landings of red snapper, ranging from a high of 236 vessels in 2003 to a low of 206 vessels in 2006. Total dockside revenues from all species on all recorded trips by these vessels averaged $9.78 million (2007 dollars) per year over this period, resulting in a per-vessel average of approximately $44,500. The highest average revenue per vessel during this period occurred in 2007 at approximately $54,600. Based on these average revenue figures, it is determined, for the purpose of this assessment, that all commercial vessels that will be affected by this interim rule are small entities.

The harvest of red snapper in the EEZ by for-hire vessels requires a snapper-grouper charter vessel/headboat permit. From 2003–2007, an average of 1,635 vessels per year were permitted to operate in the snapper-grouper for-hire fishery, of which 82 vessels are estimated to have operated as headboats. The for-hire fleet is comprised of charter vessels, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. The annual average gross revenue for charter vessels is estimated to range from approximately $80,000-$109,000 (2007 dollars) for Florida vessels, $94,000-$115,000 for North Carolina vessels, $88,000-$107,000 for Georgia vessels, and $41,000-$50,000 for South Carolina vessels. For headboats, the appropriate estimates are $220,000-$468,000 for Florida vessels, and $193,000-$410,000 for vessels in the other states. Based on these average revenue figures, it is determined, for the purpose of this assessment, that all for-hire businesses that will be affected by this interim rule are small entities. The number of for-hire vessels that are expected to be affected by this interim rule is discussed below.

Some fleet activity may exist in both the commercial and for-hire snapper-grouper sectors, but the extent of such is unknown, and all vessels are treated as independent entities in this assessment.

This interim rule does not establish any new reporting, record-keeping, or other compliance requirements.

This interim rule is expected to result in a short-term reduction in NOR to the commercial snapper grouper sector by approximately $142,000 (2007 dollars). This reduction in NOR would be expected to increase to a cumulative total of $289,000 if the prohibition is extended an additional 186 days, resulting in a prohibition for one full year. An average of 220 commercial vessels per year have recorded landings of red snapper. This interim rule is expected to result in an average reduction in NOR of approximately $645 per vessel under a 180-day prohibition, and approximately $1,300 per vessel if the prohibition is extended an additional 186 days. Although NOR are not directly comparable to dock-side revenues, the average annual dock-side

revenues from all species harvested by vessels with recorded red snapper harvests is estimated to be approximately $44,500.

For the headboat sector, this interim rule is expected to result in a short-term reduction in NOR by a maximum of approximately $1.49 million (2008 dollars). This reduction in NOR would be expected to increase to a cumulative maximum total of $3.96 million if the prohibition is extended an additional 186 days. Although 82 vessels are estimated to operate in the snapper-grouper fishery, red snapper target activity is believed to be concentrated in Georgia and northeast Florida (Mayport, FL, south through Cape Canaveral, FL) where 16 headboats operate. Approximately 70 percent of all red snapper harvested (pounds) by the headboat sector from 2003–2007 were harvested by anglers fishing from this area. The expected maximum reduction in NOR is based on the assumption that all angler trips on these 16 vessels during the respective period target red snapper and equals the change in NOR if all these trips are lost. This is considered a worst-case scenario. An unknown number of these trips will likely not target red snapper (many anglers fish to catch whatever species is available) and red snapper has historically comprised only 3 percent of the total number of fish harvested and 11 percent of the total number of pounds of fish harvested by vessels in this area. As a result, it is unlikely that all or necessarily a large portion of these trips will be canceled. Available data, however, do not support the identification of more precise estimates of the number of red snapper target trips that will be expected to be canceled, and the projected estimates of the expected change in NOR should be considered extreme upper bounds.

Because of the uncertainty associated with the number of affected vessels and the number of trips that may be canceled, the effective average reduction in NOR per headboat vessel is difficult to project. Under the worst-case scenario, the cancellation of all angler trips on Georgia and northeast Florida vessels (16) will result in a 100–percent loss of NOR for these vessels during this period of time (180 days), or approximately 44 percent of annual total NOR ($1.76 million/$3.96 million). However, if the upper bound of effects ($1.76 million) is assumed to encompass trip cancellation on vessels outside this area, it is unknown how many additional vessels should be included in the analysis. The South Carolina headboat fleet, which contains 14 vessels, accounts for the next highest red snapper harvests after the Georgia and northeast Florida fleets. If the maximum expected reduction in NOR is spread over all 30 vessels in these areas, the expected reduction in NOR will be less than 100 percent of the total annual NOR, and the average expected reduction in NOR per vessel will be approximately $49,700. This will increase to a total of approximately $132,000 under an extension of the prohibition for an additional 186 days. Although NOR are not directly comparable to gross revenues from for-hire fees, the average annual gross revenues from for-hire fees is estimated to be approximately $220,000-$468,000 for Florida headboats and $193,000-$410,000 for headboats in the other states.

For the charter sector, this interim rule is expected to result in a short-term reduction in NOR of approximately $156,000 (2008 dollars) and increase to a cumulative total of approximately $427,000 if the prohibition is extended an additional 186 days. It is noted that, although target data are available for the charter sector, trip cancellation data are not available, and the analysis assumes, similar to the analysis of the headboat sector, that all charter vessel red snapper target effort will be cancelled. As in the headboat sector, the cancellation of all trips that would have targeted red snapper in the charter sector is unlikely to occur and, as a result, the estimates of the expected change in NOR in the charter sector likely overestimate the actual reduction that will occur.

Vessel-level data are unavailable for the charter sector. As a result, it is not known how many vessels will be affected by this interim rule. An estimated 1,553 charter vessels are permitted to operate in the snapper-grouper fishery, which allows these vessels to harvest red snapper (1,635 total vessels with snapper-grouper charter vessel/headboat permits, of which 82 are estimated to operate as headboats). If the proportion of charter vessels that are expected to be affected by this interim rule is assumed to equal the proportion of headboats constituting the core red snapper vessels (16 vessels out of 82 headboats, or 19.5 percent), then approximately 303 charter vessels (19.5 percent of 1,553 vessels) would be expected to be affected. This would result in an average reduction in NOR of approximately $515 per vessel, which would increase to a total of approximately $1,400 under an extension of the prohibition for an additional 186 days. The annual average gross revenue per charter vessel from charter fees is estimated to range from approximately $80,000-$109,000 (2007 dollars) for Florida vessels, $94,000-$115,000 for North Carolina vessels, $88,000-$107,000 for Georgia vessels, and $41,000-$50,000 for South Carolina vessels.

Although all the effects described above are short-term in nature, due to the limited duration of this interim rule, continued long-term unquantified adverse economic effects could occur at the individual vessel and fishery level if the short-term effects result in business failure.

Three alternatives, including the status quo, were considered for this interim rule. This interim rule will prohibit the harvest (retention) and sale of red snapper in the South Atlantic commercial and recreational fisheries for 180 days, with extension potential for another 186 days. The first alternative to this interim rule, the status quo, would not prohibit the harvest and sale of red snapper, would not reduce overfishing of red snapper while long-term management measures are developed and implemented, and would not achieve NMFS's objective.

The second alternative to this interim rule would only establish a 4-month seasonal closure. A 4-month seasonal closure could not be extended and would not be expected to allow sufficient time for the development and implementation of long-term management measures to protect red snapper. As a result, this alternative would not achieve NMFS's objective.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: November 30, 2009

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 622.35, paragraph (l) is added to read as follows:

§ 622.35 Atlantic EEZ seasonal and/or area closures.

* * * * *

(l) *Closure of the commercial and recreational fisheries for red snapper.* The commercial and recreational

fisheries for red snapper in the South Atlantic EEZ are closed. During the closure, all fishing for red snapper is prohibited, and possession or sale of red snapper, harvested during the closure, in or from the South Atlantic EEZ is prohibited. For a person aboard a vessel for which a valid Federal commercial vessel permit or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, the provisions of this closure apply regardless of whether the red snapper were harvested or possessed in state or Federal waters.

[FR Doc. E9–28989 Filed 12–3–09; 8:45 am]
BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 74, No. 232
Friday, December 4, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0535; Airspace Docket No. 09–AGL–11]

Proposed Establishment of Class E Airspace; Langdon, ND

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace at Langdon, ND. Controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAPs) at Robertson Field Airport, Langdon, ND. The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) operations for SIAPs at Robertson Field Airport.

DATES: 0901 UTC. Comments must be received on or before January 19, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–0535/Airspace Docket No. 09–AGL–11, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2009–0535/Airspace Docket No. 09–AGL–11.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration (FAA), Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by establishing Class E airspace extending upward from 700 feet above the surface for SIAPs operations at Robertson Field Airport, Langdon, ND. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9T, signed August 27, 2009 and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish controlled airspace at Robertson Field Airport, Langdon, ND.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

Paragraph 6005 Class E Airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL ND E5 Langdon, ND [New]

Robertson Field Airport, ND
(Lat. 48°45′11″ N., long. 98°23′37″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Robertson Field Airport.

* * * * *

Issued in Fort Worth, TX, on November 16, 2009.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. E9–28895 Filed 12–3–09; 8:45 am]

BILLING CODE 4901–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740, 748, 750 and 762

[Docket No. 0907201151–91153–01]

RIN 0694–AE66

Issuance of Electronic Document and Related Recordkeeping Requirements

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: The Bureau of Industry and Security (BIS) is proposing to eliminate the use of most paper documents that it sends to parties having business before the agency. The documents that would be affected by this proposed rule are: Export and reexport licenses, notices of denial of license applications, notices of return of a license application without action, classification results, License Exception AGR notification results and encryption review request results. This proposed rule would modify the Export Administration Regulations (EAR) to implement those changes. This proposed rule also would make changes to the recordkeeping requirements associated with the elimination of paper documents. BIS is proposing to make these changes to reduce mailing costs and to free up staff time currently devoted to mailing these documents for use in other tasks.

DATES: Comments must be received by BIS no later than February 2, 2010.

FOR FURTHER INFORMATION CONTACT: Thomas Andrukonis, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce at 202 482 6393 or e-mail *tandrukoi@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Industry and Security administers an export licensing program pursuant to the Export Administration Regulations. As part of this program, BIS issues various documents in response to applications and notifications submitted to BIS by the public. Those documents include export licenses, reexport licenses, notice that an export or reexport license applications has been denied, notice that an export or reexport license application is being returned to the applicant without action, responses to License Exception AGR notifications, and notice of the results of a classification request. Collectively, these documents are referred to in this preamble as license related documents.

Currently, BIS issues the license related documents in two ways: Electronically in BIS's Simplified Network Application Processing Redesign system (SNAP–R) and on paper. Most license related documents are issued in both electronic and paper form. However, a few documents are issued only on paper. BIS now proposes to eliminate the paper version of the license related documents that it currently issues both electronically in SNAP–R and on paper.

The EAR require that export license applications, reexport license applications and License Exception AGR notifications, encryption review requests and classification requests be submitted to BIS electronically using SNAP–R unless BIS authorizes a paper submission. The license related documents associated with a SNAP–R submission are issued on line in SNAP–R where the submitter may view, save or print a copy. In addition, a paper version of each of those documents is mailed to the party. BIS does not issue electronic license related documents in situations in which BIS authorized a paper submission and in situations in which BIS must reissue the license related documents because it reopened a matter previously considered to be completed. BIS is not proposing to stop issuing paper license related documents in these two situations in which it currently issues only paper documents. BIS also is not proposing to change its practices regarding issuance of Special Comprehensive Licenses or Special Iraq Reconstruction Licenses. BIS is proposing to discontinue issuing paper documents in the situations where it currently issues both paper and electronic versions of the license related documents. BIS is also proposing to make certain changes to the recordkeeping requirements in connection with this change.

Specific Proposed Changes

Clarification that Electronic Notification in SNAP–R is Considered, for Purposes of the EAR, Written Notification of the Results of a License Exception AGR Request

This proposed rule would revise § 740.18(c)(5) to state that BIS will issue confirmation in SNAP–R or by other written notification of the decision that no agency has objected to a party's proposed use of License Exception AGR. Currently, that section merely states that BIS will issue written confirmation.

Removal of Requirement to Maintain a Log of Electronic Submissions

This proposed rule would remove the requirement currently found in § 748.7(c) that companies maintain a log of electronic submissions. The requirement was established in connection with BIS' initial electronic application process, which was instituted in the 1980s. At that time, electronic submissions were facilitated by a number of private sector vendors and the logs may have been necessary for auditing purposes. However, currently, the information required to be kept in the log duplicates information that parties are required to include in their SNAP–R submissions or that is automatically recorded by SNAP–R. BIS is proposing to discontinue the log keeping requirement because it is redundant of information available to BIS in SNAP–R. The proposed rule would accomplish this change by removing paragraph (c) of § 748.7 and

redesignating existing paragraph (d) as paragraph (c).

Removal of Language Relating to ''Computer Generated'' Licenses, the Department of Commerce Seal and Attachments to Licenses

The proposed rule would revise § 750.7(b) to state merely that BIS may issue export and reexport licenses either electronically or on paper and that each license will bear a license number. Existing language regarding ''computer generated'' licenses, the Department of Commerce seal and attachments to licenses would be removed as would an explicit requirement that exporters use the license number when communicating with BIS about the license. The proposed language would allow BIS to exercise discretion in deciding whether to issue a license electronically in SNAP–R or on paper. However, BIS expects that it will issue nearly all licenses electronically. Unless some exceptional circumstances exist, only licenses for which the applicant was authorized to file on paper and licenses that BIS cannot issue electronically (currently, only reopened licenses) will be issued on paper. BIS is proposing this change to reduce the costs of generating and mailing paper copies of licenses and to be able to assign to other tasks staff currently assigned to handling paper licenses. Because no EAR provision currently addresses issuance of the other license related documents with the specificity that § 750.7(b) addresses licenses, only § 750.7(b) need be modified to implement this change. However, BIS's intent is to issue only the electronic version of all license related documents unless BIS authorized paper submission of the original application, notice or request, or BIS cannot issue an electronic version of the applicable license related documents.

Removal of Requirement To Attach a Replacement License to the Original

This proposed rule would revise § 750.7(h)(4) to remove a requirement that the license holder attach a replacement license issued by BIS to the original license that it replaces. That requirement dates to an era in which electronic licenses did not exist and is impractical with electronic licenses issued in SNAP–R. The proposed rule would retain the requirement that the license holder keep both the original license and the replacement license.

Removal of Requirement To Retain Copies of Documents Submitted to BIS Via the SNAP–R System

This proposed rule would exempt parties who submit documents to BIS via BIS's SNAP–R system from requirements to retain copies of documents so submitted even though those documents are ''export control documents'' as defined in part 772 of the EAR. BIS believes the reliability of the SNAP–R system provides adequate assurance that the documents received by BIS were submitted and that all submitted documents are received by BIS. This proposed change would not preclude parties from storing copies of these documents.

Addition of Certain Documents to Recordkeeping Requirements in Part 762

This proposed rule would add the following documents to the list of documents required to be kept found in § 762.2(a)(10): Notification from BIS that an application is being returned without action; Notification from BIS that an application is being denied; Notification from BIS of the results of a commodity classification or encryption review request conducted by BIS. BIS believes that requiring recipients of these documents to retain them is needed to confirm receipt and to verify that the recipient received notice of the terms of the document. BIS is not proposing to require parties to retain requests for additional information concerning active matters that they receive from BIS.

Application of Original Document Retention Requirement to Documents Issued in SNAP–R

This proposed rule would state that parties who receive documents issued by BIS in SNAP–R may store the documents in one of two ways and that either way would meet the requirement of § 762.5 that original documents be retained. The two methods are: Storage of complete documents issued by BIS in SNAP–R electronically in a format readable by software possessed by the recipient party; or printing out and storing a complete paper copy of the document. BIS believes that either method that would be authorized by the proposed changes to § 762.5 would provide an accurate representation of the contents of the record and, therefore, either method should be treated as the equivalent of an original document.

Reasons for the Proposed Changes

Under its current procedure, BIS is expending funds and staff time to mail information to certain parties that is entirely duplicative of information that BIS sends to the same parties electronically. BIS is proposing these changes to reduce its operating costs and to free the staff time currently devoted to mailing paper documents for other purposes. BIS estimates that it currently spends approximately $25,000 annually in direct mailing costs (envelopes, supplies and postage) to send out paper copies of the licenses, and responses to classification requests, encryption review requests and License Exception AGR notifications. BIS also estimates that about 1.5 hours of staff time is expended each day in connection with mailing these documents.

Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation contains a collection previously approved by OMB under control number 0694–0096.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The Chief Counsel for Regulations of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities.

Economic Impact

BIS implemented a revised version of its Simplified Network Applications Processing System (SNAP–R) in October 2006. The SNAP–R system provides a Web based mechanism for parties to submit license applications, classification requests, License Exception AGR notifications and encryption review requests electronically and for BIS to respond electronically to each matter. In October 2008, BIS made use of the SNAP–R system mandatory except in five specified circumstances. SNAP–R is the vehicle through which BIS receives most of the submissions for which SNAP–R is available.

During the period from January 1, 2009 through May 31, 2009, BIS

received 11,580 submissions via SNAP–R and 36 submissions via the paper application forms. Under existing procedures BIS would send the final results for the 11,580 SNAP–R submissions to the submitting party both electronically in SNAP–R and on paper. Under this proposed rule, BIS would send those final results via SNAP–R only. Final responses in the 36 instances in which BIS accepted a paper submission would continue to receive paper responses under this proposed rule. In addition, during the period from January 1, 2009 through May 31, 2009, BIS reopened 246 matters relating to submissions affected by this rule that previously had been considered to be closed. BIS would continue to issue the documents announcing the decision in these reopened matters on paper because the SNAP–R system currently is incapable of issuing such documents.

The parties who currently receive both a SNAP–R and a paper response may fulfill the EAR recordkeeping requirement for these documents by either storing the electronic version in appropriate media or by storing the paper copy. Under the proposed rule parties who store the electronic document could continue doing so without any change. Parties who currently store only the paper copy would have to convert to electronic storage or would have to print out a paper copy of the electronic document and store that copy.

BIS believes that the burden on parties that would have to change their procedures would be negligible. Only parties who submitted an application, notification or request electronically are affected by this rule. The fact that a party makes an electronic submission is a good indication that the party is equipped to store incoming documents electronically. In addition, BIS believes that the burden of printing out a paper copy of a document and filing it is not substantially greater than the burden of routing a paper envelope to the proper person, opening the envelope and filing the contents.

Number of Small Entities

In fiscal year 2008, BIS processed nearly 30,000 transactions that would be subject to this rule. BIS does not know the number of small entities that would be affected by this rule. BIS does not know the size of all of the entities that submit the applications, notifications and requests to which this rule applies nor does BIS know which such entities currently utilize paper recordkeeping. However, two of the criteria under which BIS authorizes paper submissions (lack of access to the Internet and no more than one submission in the previous twelve months) are likely to remove the smallest of businesses from the impact of this rule.

Conclusion

Regardless of the number of entities affected, the burden that would be imposed by the rule is negligible.

List of Subjects

15 CFR Parts 740, 748 and 750

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 762

Administrative practice and procedure, Business and industry, Confidential business information, Exports, Reporting and recordkeeping requirements.

Accordingly, the Export Administration Regulations (15 CFR Parts 730–774) are proposed to be amended as follows:

PART 740—[AMENDED]

1. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 7201 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 13, 2009, 74 FR 41325 (August 14, 2009).

2. Section 740.18 is amended by revising the sixth sentence of paragraph (c)(5) to read as follows:

§ 740.18 Agricultural commodities.

* * * * *

(c) * * *

(5) * * * BIS will issue written confirmation electronically in SNAP–R or via paper. * * *

* * * * *

PART 748—[AMENDED]

3. The authority citation for part 748 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 13, 2009, 74 FR 41325 (August 14, 2009).

§ 748.7 [Amended]

4. Section 748.7 is amended by removing paragraph (c) and redesignating paragraph (d) as paragraph (c).

PART 750—[AMENDED]

5. The authority citation for part 750 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 13, 2009, 74 FR 41325 (August 14, 2009).

6. Section 750.7 is amended by removing the final sentence from paragraph (a) and by revising paragraph (b) and paragraph (h)(4) to read as follows:

§ 750.7 Issuance of licenses

* * * * *

(b) *Issuance of a license.* BIS may issue a license electronically via its Simplified Network Application Processing (SNAP–R) system or via paper or both electronically and via paper. Each license has a license number that will be shown on the license.

* * * * *

(h) * * *

(4) *Replacement license.* If you have been issued a ''replacement license'' (for changes to your original license not covered in paragraph (c) of this section), you must retain both the original and the replacement license.

* * * * *

PART 762—[AMENDED]

7. The authority citation for part 762 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 13, 2009, 74 FR 41325 (August 14, 2009).

8. Section 762.2 is amended by:

a. Revising paragraph (a)(1),

b. Removing the comma and the word ''and'' from the end of paragraph (a)(9),

c. Inserting a semicolon at the end of paragraph (a)(9),

d. Redesignating paragraph (a)(10) as paragraph (a)(11), and

e. Adding a new paragraph (a)(10) to read as follows:

§ 762.2 Records to be retained.

(a) * * *

(1) Export control documents as defined in part 772 of the EAR, except parties submitting documents electronically to BIS via the SNAP–R system are not required to retain copies of documents so submitted;

* * *

(10) Notification from BIS of an application being returned without action; Notification by BIS of an application being denied; Notification by BIS of the results of a commodity

classification or encryption review request conducted by BIS; and,

* * * * *

9. Section 762.4 is amended by adding a sentence at the end of the section to read as follows:

§ 762.4 Original records required.

* * * With respect to documents that BIS issues to a party in SNAP–R, either an electronically stored copy in a format that makes the document readable with software possessed by that party or a paper print out of the complete document is deemed to be an original record for purposes of this paragraph.

Dated: November 30, 2009.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. E9–28982 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–33–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 405, 416, and 422

[Docket No. SSA–2008–0015]

RIN 0960–AG80

Reestablishing Uniform National Disability Adjudication Provisions

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: We propose to eliminate the remaining portions of part 405 of our rules, which we now use for initial disability claims in our Boston region. We propose to use the same rules for disability claims in the Boston region that we use for disability adjudications in the rest of the country, including those rules that apply to the administrative law judge (ALJ) and Appeals Council (AC) levels of our administrative review process in parts 404 and 416 of our rules.

DATES: To be sure that we consider your comments, we must receive them no later than February 2, 2010.

ADDRESSES: You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2008–0015 so that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the Internet. Please visit the Federal eRulemaking portal at *http://www.regulations.gov.* Use the *Search* function to find docket number SSA–2008–0015. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Mail your comments to the Office of Regulations, Social Security Administration, 137 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Dean Landis, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–0520 for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

Background

On March 31, 2006, we published final rules in the **Federal Register** that implemented a number of changes in the process for handling initial disability claims. 71 FR 16424. We referred to those regulations, found primarily in 20 CFR part 405, collectively as the Disability Service Improvement process, or DSI. We intended DSI to improve the way we handle initial disability claims. DSI added rules that implemented a Quick Disability Determination (QDD) process at the initial step of our disability determination process. It also replaced the reconsideration step of the administrative review process with review by a Federal Reviewing Official (FedRO), established a Medical and Vocational Expert System, commonly known as the Office of Medical and Vocational Expertise (OMVE), and made changes to some of the procedures in our hearings process. DSI also eliminated the final step in our administrative review process for initial disability claims, under which a claimant could request review by the Appeals Council. We replaced the Appeals Council with the Decision Review Board (DRB). The DRB, which is composed of selected ALJs and administrative appeals judges (AAJs), reviews certain decisions made by ALJs before those decisions become final. If the DRB does not review an ALJ's decision, the ALJ's decision becomes our final decision. On August 1, 2006, we implemented the DSI rules in our Boston region, which consists of the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. We planned to implement them in our remaining regions over a period of years.

As part of our efforts to improve our administrative review process, we have continually monitored the DSI process and made appropriate changes when necessary. For example, we published final rules on September 6, 2007, that implemented the QDD process nationally. 72 FR 51173. In other final rules, we suspended new claims processing through the Office of the Federal Reviewing Official (OFedRO) and the OMVE as of March 23, 2008, so that we could reallocate those resources to reduce the backlog at the hearing level. 73 FR 2411, corrected at 73 FR 10381. In November 2008, the OFedRO issued a decision on the last of the claims it had accepted for review. Thus, in accordance with our final rules, subpart C of part 405 is no longer in effect, and the States in the Boston region have returned to the process they were following before August 2006, whether that process was reconsideration of an initial determination under §§ 404.907 and 416.1407 or the testing procedures found in §§ 404.906 and 416.1406. 73 FR at 2412.

In addition, on October 29, 2007, we published a notice of proposed rulemaking (NPRM) that would have implemented nationally a number of changes to the hearings and appeals processes. 72 FR 61218. We made those proposals against the backdrop of increasing workloads, lengthening hearing backlogs, and diminishing resources. While we continue to believe that many of the provisions contained in the October 29, 2007, NPRM would have both protected claimants' rights and made the disability process more

efficient, we are reevaluating a number of the provisions in those proposed rules in light of the many comments we received.

In this NPRM, we are proposing to eliminate the DRB and restore in the Boston region the same rules and procedures at the ALJ hearing and Appeals Council levels that we follow in the rest of the country. With the other changes we have already made to the DSI process, we would no longer need the DSI rules in part 405 if these proposed rules become final. These proposed rules would not affect our Prototype and Single Decision Maker demonstration projects, and we will not discuss them in this NPRM.

Explanation of Proposed Changes

Proposed Changes to the Hearings and Appeals Levels of the Administrative Review Process

After adopting QDD nationwide and eliminating the FedRO and OMVE processes, the remaining portions of DSI primarily involve procedures at the ALJ hearing and DRB levels. We propose to eliminate these remaining portions of the DSI process, which we currently use only in the Boston region, and apply the same ALJ and Appeals Council rules in parts 404 and 416 that we use in the rest of the country. We are proposing the ALJ hearing level changes in order to ensure that all hearings use the same process for administrative efficiency.

Under the DSI rules, if you file your initial disability claim in the Boston region, we will use the DSI procedures even if you later move to a State in another region. Conversely, if you file your initial disability claim in a State outside the Boston region, we will continue to use our non-DSI rules, even if you later move to a State within the Boston region. 20 CFR part 405, subpart A, Appendix 1. Currently in DSI cases in which the claimant leaves the Boston region and videoconferencing is not possible, ALJs from the Boston region must travel to the non-DSI regions to hear the cases. This process is inefficient and increases the ALJ workload burden, not just on the ALJs who must travel to hear the DSI cases, but on other ODAR employees who are needed to support the process, and on those claimants whose cases may be delayed. We believe it would be better to return the Boston region to the same hearings process we use in the rest of the country, improving both the consistency and efficiency of the process. We invite public comment on our proposal to apply in the Boston region the same ALJ and Appeals Council rules that we use in the rest of the country.

We also propose to eliminate the DRB provisions in the DSI process. Under these proposed rules, we would restore a claimant's right to request administrative review of an ALJ's decision in claims in the Boston region. We believe that we could better use our resources by eliminating the DRB.

The DRB's workload has grown quickly and has become overwhelming. Originally, we intended to limit DRB review to cases selected using an automated predictive model that would identify the most error-prone cases. However, we have not been able to implement this model and do not expect to be able to do so in the foreseeable future. Without this tool, the DRB cannot focus on only selected cases, severely limiting its ability to function as we intended and requiring significantly more resources than we had anticipated.

As a result, the DRB's workload has had a disproportionate impact on the resources of the Appeals Council. Before we implemented DSI, requests for review from the Boston region represented a small fraction of the Appeals Council's total requests for review. The increased need for resources devoted to the DRB diverts Appeals Council staff from other key workloads.

As we continue to work down our disability hearings backlog, the number of ALJ adjudications nationwide has increased, leading to both an increased DRB workload in the Boston region and an increased number of requests for review by the Appeals Council in other areas of the country.

The DRB also affects our resources at the hearing level and our ability to reduce the hearing backlog. Those ALJs working full-time on the DRB are unavailable to hold hearings. We will need to assign even more ALJs to the DRB's workload as the number of DRB receipts rises. Consequently, the continued use of the DRB adversely affects our ability to reduce the hearings backlog. We invite public comment on our proposal to remove the DRB provisions from our regulations.

Proposal To Remove Part 405

If we make final the proposed changes to the hearings and appeals levels of our process, we would no longer need part 405 of our rules. The proposed changes to the ALJ hearing and DRB provisions would remove subparts D and E of part 405 and related sections in subpart A. We have already published final rules that either remove other aspects of the DSI process or extend them nationally.

As we stated above, under the final rules we published in March 2008 suspending the FedRO program, subpart C of part 405 is no longer in effect. We have also terminated the OMVE initiative described in the DSI rules. Our rules state that, absent a decision by the Commissioner of Social Security to extend the sunset date, the OMVE provisions would no longer be effective the day after a FedRO issues a decision on the last of the claims accepted for FedRO review. Section 405.10(d).

We propose to remove all remaining DSI rules and use the same rules for adjudication in the Boston region as we use in the rest of the country. Most remaining provisions of the DSI regulations are general provisions that are also addressed in parts 404 and 416 of our rules. These remaining provisions also include definitions of various terms in the DSI program, extension of the deadline to request review of our action, disqualification of disability adjudicators, discrimination complaints, initial determinations, judicial review, reopening and revision of determinations and decisions, expedited appeals in Constitutional claims, and payment of certain travel expenses. We also invite public comment on our proposal to eliminate all remaining DSI provisions.

Conforming Changes

We also propose a number of conforming changes to sections in parts 404, 416, and 422 to reflect this proposed removal of the DSI rules.

Clarity of These Proposed Rules

Executive Order 12866 requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make them easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists or diagrams?
- What else could we do to make the rules easier to understand?

When Will We Start To Use These Rules?

We will not use these rules until we evaluate the public comments, determine whether to issue them as final rules, and issue final rules in the **Federal Register**. If we publish final rules, we will explain in the preamble how we will apply them, and summarize and respond to the significant public comments. Until the effective date of any final rules, we will continue to use our current rules.

We will apply any final rules based on these proposed rules to all new disability claims in the Boston region. We will also apply the final rules to any disability claims in the Boston region that are pending in our administrative review process on or after the effective date of the final rules, including cases that are pending on remand from the Federal courts.

If we adopt these rules as proposed, we would no longer require the claimant to submit evidence at least 5 business days before the date of the scheduled hearing (or to show good cause if submitted later). On the effective date of these final rules, we will accept evidence consistent with the provisions of parts 404 and 416.

Under the current DSI rules, we notify claimants at least 75 days before the date of the scheduled hearing. If we adopt these rules as proposed, we would hold any previously-scheduled hearings on the date provided in the notice.

On the effective date of the final rules, we plan to transfer any cases pending before the DRB to the Appeals Council. We will treat any decisions referred to the DRB for review as if the claimant had requested Appeals Council review of the hearing decision. For cases in which the claimant requested that the DRB review a dismissal by an ALJ, we will treat the pending request as a request for Appeals Council review of the ALJ's dismissal. We will transfer any cases remanded by a Federal court that had been assigned to the DRB to the Appeals Council.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that this proposed rule is subject to OMB review because it meets the criteria for a significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

We certify that this proposed rule, if published in final, will not have a significant economic impact on a substantial number of small entities because it affects only individuals. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed rules do not create any new or affect any existing collections and, therefore, do not require Office of Management and Budget approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Reporting and recordkeeping requirements; Social Security.

20 CFR Part 405

Administrative practice and procedure; Blind, Disability benefits; Old-Age, Survivors, and Disability Insurance; Public assistance programs; Reporting and recordkeeping requirements; Social Security; Supplemental Security Income (SSI).

20 CFR Part 416

Administrative practice and procedure; Aged, Blind, Disability benefits, Public Assistance programs; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

20 CFR Part 422

Administrative practice and procedure; Organization and functions (Government agencies); Reporting and recordkeeping requirements; Social Security.

Dated: August 28, 2009.

Michael J. Astrue,

Commissioner of Social Security.

For the reasons set out in the preamble and under sec. 702(a)(5) of the Social Security Act (42 U.S.C. 902(a)(5)), we propose to amend subparts J, P, and Q of part 404, remove and reserve part 405, and amend subparts I, J, and N of part 416 and subparts B and C of part 422 of chapter III of title 20 Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart J–[Amended]

1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a), (b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a), (b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Public Law 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Public Law 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Public Law 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

§ 404.906 [Amended]

2. Amend § 404.906 by removing the fourth sentence of paragraph (b)(4).

§ 404.930 [Amended]

3. Amend § 404.930 by removing paragraph (c).

Subpart P—[Amended]

4. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Public Law 104–193, 110 Stat. 2105, 2189; sec. 202, Public Law 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

5. Amend § 404.1502 by revising the definition of nonexamining source to read as follows:

§ 404.1502 General definitions and terms for this subpart.

* * * * *

Nonexamining source means a physician, psychologist, or other acceptable medical source who has not examined you but provides a medical or other opinion in your case. At the administrative law judge hearing and Appeals Council levels of the administrative review process, it includes State agency medical and psychological consultants, other program physicians and psychologists, and medical experts or psychological experts we consult. See § 404.1527.

* * * * *

6. Amend § 404.1512 by revising paragraph (b)(6) to read as follows:

§ 404.1512 Evidence.

* * * * *

(b) * * *

(6) At the administrative law judge and Appeals Council levels, findings, other than the ultimate determination about whether you are disabled, made by State agency medical or

psychological consultants and other program physicians or psychologists, and opinions based on their review of the evidence in your case record expressed by medical experts that we consult. See §§ 404.1527(f)(2)–(3).

* * * * *

7. Amend § 404.1513 by revising the first sentence of paragraph (c) to read as follows:

§ 404.1513 Medical and other evidence of your impairment(s).

* * * * *

(c) * * * At the administrative law judge and Appeals Council levels, we will consider residual functional capacity assessments made by State agency medical and psychological consultants, and other program physicians and psychologists to be ''statements about what you can still do'' made by nonexamining physicians and psychologists based on their review of the evidence in the case record. * * *

* * * * *

8. Amend § 404.1519k by revising paragraph (a) to read as follows:

§ 404.1519k Purchase of medical examinations, laboratory tests, and other services.

* * * * *

(a) The rate of payment to be used for purchasing medical or other services necessary to make determinations of disability may not exceed the highest rate paid by Federal or public agencies in the State for the same or similar types of service. See §§ 404.1624 and 404.1626 of this part.

* * * * *

9. Amend § 404.1519m by revising the third sentence to read as follows:

§ 404.1519m Diagnostic tests or procedures.

* * * A State agency medical consultant must approve the ordering of any diagnostic test or procedure when there is a chance it may involve significant risk. * * *

10. Amend § 404.1519s by revising paragraph (c) to read as follows:

§ 404.1519s Authorizing and monitoring the consultative examination.

* * * * *

(c) Consistent with Federal and State laws, the State agency administrator will work to achieve appropriate rates of payment for purchased medical services.

* * * * *

11. Amend § 404.1520a by revising the third sentence and removing the fourth sentence of paragraph (d)(2), and revising paragraph (e) to read as follows:

§ 404.1520a Evaluation of mental impairments.

* * * * *

(d) * * *

(2) * * * We will record the presence or absence of the criteria and the rating of the degree of functional limitation on a standard document at the initial and reconsideration levels of the administrative review process, or in the decision at the administrative law judge hearing and Appeals Council levels (in cases in which the Appeals Council issues a decision). * * *

* * * * *

(e) *Documenting application of the technique.* At the initial and reconsideration levels of the administrative review process, we will complete a standard document to record how we applied the technique. At the administrative law judge hearing and Appeals Council levels (in cases in which the Appeals Council issues a decision), we will document application of the technique in the decision.

(1) At the initial and reconsideration levels, except in cases in which a disability hearing officer makes the reconsideration determination, our medical or psychological consultant has overall responsibility for assessing medical severity. The State agency disability examiner may assist in preparing the standard document. However, our medical or psychological consultant must review and sign the document to attest that it is complete and that he or she is responsible for its content, including the findings of fact and any discussion of supporting evidence. When a disability hearing officer makes a reconsideration determination, the determination must document application of the technique, incorporating the disability hearing officer's pertinent findings and conclusions based on this technique.

(2) At the administrative law judge hearing and Appeals Council levels, the written decision must incorporate the pertinent findings and conclusions based on the technique. The decision must show the significant history, including examination and laboratory findings, and the functional limitations that were considered in reaching a conclusion about the severity of the mental impairment(s). The decision must include a specific finding as to the degree of limitation in each of the functional areas described in paragraph (c) of this section.

(3) If the administrative law judge requires the services of a medical expert to assist in applying the technique but such services are unavailable, the administrative law judge may return the case to the State agency or the appropriate Federal component, using the rules in § 404.941, for completion of the standard document. If, after reviewing the case file and completing the standard document, the State agency or Federal component concludes that a determination favorable to you is warranted, it will process the case using the rules found in § 404.941(d) or (e). If, after reviewing the case file and completing the standard document, the State agency or Federal component concludes that a determination favorable to you is not warranted, it will send the completed standard document and the case to the administrative law judge for further proceedings and a decision.

12. Amend § 404.1526 by revising the first sentence of paragraph (d) to read as follows:

§ 404.1526 Medical equivalence.

* * * * *

(d) * * * A medical or psychological consultant designated by the Commissioner includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. * * *

* * * * *

13. Amend § 404.1527 by revising the first sentence of paragraph (f)(1) and removing paragraph (f)(4), to read as follows:

§ 404.1527 Evaluating opinion evidence.

* * * * *

(f) * * *

(1) In claims adjudicated by the State agency, a State agency medical or psychological consultant will consider the evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or equals the requirements for any impairment listed in appendix 1 to this subpart, and your residual functional capacity. * * *

* * * * *

14. Amend § 404.1529 by revising the third and fifth sentences of paragraph (b) to read as follows:

§ 404.1529 How we evaluate symptoms, including pain.

* * * * *

(b) * * * In cases decided by a State agency (except in disability hearings under §§ 404.914 through 404.918 of this chapter), a State agency medical or psychological consultant, or a medical

or psychological consultant designated by the Commissioner, directly participates in determining whether your medically determinable impairment(s) could reasonably be expected to produce your alleged symptoms. * * * At the administrative law judge hearing or Appeals Council level of the administrative review process, the adjudicator(s) may ask for and consider the opinion of a medical or psychological expert concerning whether your impairment(s) could reasonably be expected to produce your alleged symptoms. * * *

* * * * *

15. Amend § 404.1546 by revising paragraph (a) and removing paragraph (d), to read as follows:

§ 404.1546 Responsibility for assessing your residual functional capacity.

(a) * * * When a State agency makes the disability determination, a State agency medical or psychological consultant(s) is responsible for assessing your residual functional capacity.

* * * * *

Subpart Q—[Amended]

16. The authority citation for subpart Q of part 404 continues to read as follows:

Authority: Secs. 205(a), 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405(a), 421, and 902(a)(5)).

§ 404.1601 [Amended]

17. Amend § 404.1601 by removing the third sentence of the introductory text before paragraph (a).

§ 404.1616 [Amended]

18. Amend § 404.1616 by removing the third sentence of paragraph (b), and removing paragraph (e)(4).

19. Amend § 404.1624 by revising the first sentence to read as follows:

§ 404.1624 Medical and other purchased services.

The State will determine the rates of payment to be used for purchasing medical or other services necessary to make determinations of disability.

* * *

PART 405—[REMOVED AND RESERVED]

20. Remove and reserve part 405, consisting of §§ 405.1 through 405.901.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart I—[Amended]

21. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383(b); secs. 4(c) and 5, 6(c)–(e), 14(a), and 15, Public Law 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, 1382h note).

22. Amend § 416.902 by revising the definition of nonexamining source to read as follows:

§ 416.902 General definitions and terms for this subpart.

* * * * *

Nonexamining source means a physician, psychologist, or other acceptable medical source who has not examined you but provides a medical or other opinion in your case. At the administrative law judge hearing and Appeals Council levels of the administrative review process, it includes State agency medical and psychological consultants, other program physicians and psychologists, and medical experts or psychological experts we consult. See § 416.927.

* * * * *

23. Amend § 416.912 by revising paragraph (b)(6) to read as follows:

§ 416.912 Evidence.

* * * * *

(b) * * *

(6) At the administrative law judge and Appeals Council levels, findings, other than the ultimate determination about whether you are disabled, made by State agency medical or psychological consultants and other program physicians or psychologists, and opinions based on their review of the evidence in your case record expressed by medical experts that we consult. See §§ 416.927(f)(2)–(3).

* * * * *

24. Amend § 416.913 by revising the first sentence of paragraph (c) to read as follows:

§ 416.913 Medical and other evidence of your impairment(s).

* * * * *

(c) * * * At the administrative law judge and Appeals Council levels, we will consider residual functional capacity assessments made by State agency medical and psychological consultants and other program physicians and psychologists to be ''statements about what you can still do'' made by nonexamining physicians and psychologists based on their review of the evidence in the case record.

* * *

* * * * *

25. Amend § 416.919k by revising paragraph (a) to read as follows:

§ 416.919k Purchase of medical examinations, laboratory tests, and other services.

* * * * *

(a) The rate of payment to be used for purchasing medical or other services necessary to make determinations of disability may not exceed the highest rate paid by Federal or public agencies in the State for the same or similar types of service. See §§ 416.1024 and 416.1026.

* * * * *

26. Amend § 416.919m by revising the third sentence to read as follows:

§ 416.919m Diagnostic tests or procedures.

* * * A State agency medical consultant must approve the ordering of any diagnostic test or procedure when there is a chance it may involve significant risk. * * *

27. Amend § 416.919s by revising paragraph (c) to read as follows:

§ 416.919s Authorizing and monitoring the consultative examination.

* * * * *

(c) Consistent with Federal and State laws, the State agency administrator will work to achieve appropriate rates of payment for purchased medical services.

* * * * *

28. Amend § 416.920a by revising the third sentence and removing the fourth sentence of paragraph (d)(2) and revising paragraph (e) to read as follows:

§ 416.920a Evaluation of mental impairments.

* * * * *

(d) * * *

(2) * * * We will record the presence or absence of the criteria and the rating of the degree of functional limitation on a standard document at the initial and reconsideration levels of the administrative review process, or in the decision at the administrative law judge hearing and Appeals Council levels (in cases in which the Appeals Council issues a decision). * * *

* * * * *

(e) *Documenting application of the technique.* At the initial and reconsideration levels of the administrative review process, we will complete a standard document to record

how we applied the technique. At the administrative law judge hearing and Appeals Council levels (in cases in which the Appeals Council issues a decision), we will document application of the technique in the decision.

(1) At the initial and reconsideration levels, except in cases in which a disability hearing officer makes the reconsideration determination, our medical or psychological consultant has overall responsibility for assessing medical severity. The State agency disability examiner may assist in preparing the standard document. However, our medical or psychological consultant must review and sign the document to attest that it is complete and that he or she is responsible for its content, including the findings of fact and any discussion of supporting evidence. When a disability hearing officer makes a reconsideration determination, the determination must document application of the technique, incorporating the disability hearing officer's pertinent findings and conclusions based on this technique.

(2) At the administrative law judge hearing and Appeals Council levels, the written decision must incorporate the pertinent findings and conclusions based on the technique. The decision must show the significant history, including examination and laboratory findings, and the functional limitations that were considered in reaching a conclusion about the severity of the mental impairment(s). The decision must include a specific finding as to the degree of limitation in each of the functional areas described in paragraph (c) of this section.

(3) If the administrative law judge requires the services of a medical expert to assist in applying the technique but such services are unavailable, the administrative law judge may return the case to the State agency or the appropriate Federal component, using the rules in § 416.1441, for completion of the standard document. If, after reviewing the case file and completing the standard document, the State agency or Federal component concludes that a determination favorable to you is warranted, it will process the case using the rules found in § 416.1441(d) or (e). If, after reviewing the case file and completing the standard document, the State agency or Federal component concludes that a determination favorable to you is not warranted, it will send the completed standard document and the case to the administrative law judge for further proceedings and a decision.

29. Amend § 416.924 by revising paragraph (g) to read as follows:

§ 416.924 How we determine disability for children.

* * * * *

(g) * * * When we make an initial or reconsidered determination whether you are disabled under this section or whether your disability continues under § 416.994a (except when a disability hearing officer makes the reconsideration determination), we will complete a standard form, Form SSA–538, Childhood Disability Evaluation Form. The form outlines the steps of the sequential evaluation process for individuals who have not attained age 18. The State agency medical or psychological consultant (see § 416.1016 of this part) or other designee of the Commissioner has overall responsibility for the content of the form and must sign the form to attest that it is complete and that he or she is responsible for its content, including the findings of fact and any discussion of supporting evidence. Disability hearing officers, administrative law judges, and the administrative appeals judges on the Appeals Council (when the Appeals Council makes a decision) will not complete the form but will indicate their findings at each step of the sequential evaluation process in their determinations or decisions.

30. Amend § 416.926 by revising the first sentence of paragraph (d) and revising paragraph (e) to read as follows:

§ 416.926 Medical equivalence for adults and children.

* * * * *

(d) * * * A medical or psychological consultant designated by the Commissioner includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. * * *

(e) *Responsibility for determining medical equivalence.* In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (see § 416.1016 of this part) has the overall responsibility for determining medical equivalence. For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining medical equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 416.1418, with the Associate Commissioner for Disability Programs or his or her delegate. For cases at the administrative law judge or Appeals Council level, the responsibility for deciding medical equivalence rests with the administrative law judge or Appeals Council.

31. Amend § 416.926a by revising paragraph (n) to read as follows:

§ 416.926a Functional equivalence for children.

* * * * *

(n) *Responsibility for determining functional equivalence.* In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (see § 416.1016 of this part) has the overall responsibility for determining functional equivalence. For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining functional equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 416.1418, with the Associate Commissioner for Disability Programs or his or her delegate. For cases at the administrative law judge or Appeals Council level, the responsibility for deciding functional equivalence rests with the administrative law judge or Appeals Council.

32. Amend § 416.927 by revising the first sentence of paragraph (f)(1) and removing paragraph (f)(4), to read as follows:

§ 416.927 Evaluating opinion evidence.

* * * * *

(f) * * *

(1) In claims adjudicated by the State agency, a State agency medical or psychological consultant will consider the evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or equals the requirements for any impairment listed in appendix 1 to subpart P of part 404 of this chapter, and your residual functional capacity. * * *

* * * * *

33. Amend § 416.929 by revising the third and fifth sentences of paragraph (b) to read as follows:

§ 416.929 How we evaluate symptoms, including pain.

* * * * *

(b) * * * In cases decided by a State agency (except in disability hearings under §§ 416.1414 through 416.1418 of this part), a State agency medical or psychological consultant, or a medical or psychological consultant designated by the Commissioner, directly participates in determining whether your medically determinable impairment(s) could reasonably be expected to produce your alleged symptoms. * * * At the administrative law judge hearing or Appeals Council level of the administrative review process, the adjudicator(s) may ask for and consider the opinion of a medical or psychological expert concerning whether your impairment(s) could reasonably be expected to produce your alleged symptoms. * * *

* * * * *

34. Amend § 416.946 by revising paragraph (a) and removing paragraph (d), to read as follows:

§ 416.946 Responsibility for assessing your residual functional capacity.

(a) * * * When a State agency makes the disability determination, a State agency medical or psychological consultant(s) is responsible for assessing your residual functional capacity.

* * * * *

Subpart J—[Amended]

35. The authority citation for subpart J of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1614, 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382c, 1383, and 1383b).

§ 416.1001 [Amended]

36. Amend § 416.1001 by removing the third sentence of the introductory text before paragraph (a).

§ 416.1016 [Amended]

37. Amend § 416.1016 by removing the third sentence of paragraph (b) and removing paragraph (e)(4).

38. Amend § 416.1024 by revising the first sentence to read as follows:

§ 416.1024 Medical and other purchased services.

The State will determine the rates of payment to be used for purchasing medical or other services necessary to make determinations of disability.

* * *

Subpart N—[Amended]

39. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Public Law 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

§ 416.1406 [Amended]

40. Amend § 416.1406 by removing the fourth sentence of paragraph (b)(4).

§ 416.1430 [Amended]

41. Amend § 416.1430 by removing paragraph (c).

PART 422—ORGANIZATION AND PROCEDURES

Subpart B—[Amended]

42. The authority citation for subpart B of part 422 continues to read as follows:

Authority: Secs. 205, 232, 702(a)(5), 1131, and 1143 of the Social Security Act (42 U.S.C. 405, 432, 902(a)(5), 1320b–1, and 1320b–13), and sec. 7213(a)(1)(A) of Public Law 108–458.

43. Amend § 422.130 by revising the first sentence of paragraph (b) and the second sentence of paragraph (c) to read as follows:

§ 422.130 Claim procedure.

* * * * *

(b) * * * An individual who files an application for monthly benefits, the establishment of a period of disability, a lump-sum death payment, or entitlement to hospital insurance benefits or supplementary medical insurance benefits, either on his own behalf or on behalf of another, must establish by satisfactory evidence the material allegations in his application, except as to earnings shown in the Social Security Administration's records (see subpart H of part 404 of this chapter for evidence requirements in nondisability cases and subpart P of part 404 of this chapter for evidence requirements in disability cases). * * *

(c) * * * Section 404.1503 of this chapter has a discussion of the respective roles of State agencies and the Administration in the making of disability determinations and information regarding initial determinations as to entitlement or termination of entitlement in disability claims. * * *

44. Revise § 422.140 to read as follows:

§ 422.140 Reconsideration of initial determination.

If you are dissatisfied with an initial determination with respect to entitlement to monthly benefits, a lump-sum death payment, a period of disability, a revision of an earnings record, with respect to any other right under title II of the Social Security Act, or with respect to entitlement to hospital insurance benefits or supplementary medical insurance benefits, you may request that we reconsider the initial determination. The information in § 404.1503 of this chapter as to the respective roles of State agencies and the Social Security Administration in making disability determinations is also generally applicable to the reconsideration of initial determinations involving disability. However, in cases in which a disability hearing as described in §§ 404.914 through 404.918 and §§ 416.1414 through 416.1418 of this chapter is available, the reconsidered determination may be issued by a disability hearing officer or the Associate Commissioner for Disability Programs or his or her delegate. After the initial determination has been reconsidered, we will mail you written notice and inform you of your right to a hearing before an administrative law judge (see § 422.201).

Subpart C—[Amended]

45. Revise the heading of subpart C of part 422 to read as follows:

Subpart C—Procedures of the Office of Disability Adjudication and Review.

46. The authority citation for subpart C of part 422 continues to read as follows:

Authority: Secs. 205, 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405, 421, and 902(a)(5)); 30 U.S.C. 923(b).

47. Amend § 422.201 by revising the first sentence and removing the third sentence of the introductory text before paragraph (a) to read as follows:

§ 422.201 Material included in this subpart.

This subpart describes in general the procedures relating to hearings before an administrative law judge of the Office of Disability Adjudication and Review, review by the Appeals Council of the hearing decision or dismissal, and court review in cases decided under the procedures in parts 404, 408, 410, and 416 of this chapter. * * *

* * * * *

[FR Doc. E9–28993 Filed 12–3–09; 8:45 am]

BILLING CODE 4191–02–P

NATIONAL MEDIATION BOARD

29 CFR Parts 1202 and 1206

[Docket No. C–6964]

RIN 3140–ZA00

Representation Election Procedure

AGENCY: National Mediation Board.

ACTION: Proposed rule; clarification.

SUMMARY: This document clarifies a proposed rule appearing in the **Federal Register** on November 3, 2009. The previous document did not include the factual basis for the National Mediation Board's certification, under Section 605 of the Regulatory Flexibility Act, that the proposed rule is not expected to have a significant economic impact on a substantial number of small entities. The proposed rule affects only the Board's election process and the method used by the Board to determine the outcome of a self-organization vote by employees. The proposed rule would not directly affect any small entities as defined under the Regulatory Flexibility Act. Accordingly, the National Mediation Board certifies that it will not have a significant impact on a substantial number of small entities.

DATES: Comments for the proposed rule published on November 3, 2009 (74 FR 56750) continue to be accepted until January 4, 2010.

FOR FURTHER INFORMATION CONTACT: Mary Johnson, General Counsel, National Mediation Board, 202–692–5050, *infoline@nmb.gov.*

SUPPLEMENTARY INFORMATION: This document clarifies the proposed rule published on November 3, 2009 at 74 FR 56750. The Board is proposing to amend its Railway Labor Act rules to provide that, in representation disputes, a majority of valid ballots cast will determine the craft or class representative.

Dated: December 1, 2009.

Mary Johnson,

General Counsel, National Mediation Board.

[FR Doc. E9–28981 Filed 12–3–09; 8:45 am]

BILLING CODE 7550–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0959]

RIN 1625–AA09

Drawbridge Operation Regulation; Chehalis River, Aberdeen, WA, Schedule Change

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the drawbridge operation regulation for the U.S. Highway 101 bascule bridge across the Chehalis River, mile 0.1, at Aberdeen, Washington, so that one-hour notice would be required at all times. The change is necessary to allow the bridge owner to reduce the staffing requirements of the bridge in light of the infrequent openings requested for the bridge.

DATES: Comments and related material must reach the Coast Guard on or before February 2, 2010.

ADDRESSES: You may submit comments identified by the Coast Guard docket number USCG–2009–0959 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these methods. *See* the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Austin Pratt, Chief, Bridge Section, Waterways Management Branch, 13th Coast Guard District; telephone 206–220–7282, e-mail *william.a.pratt@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2009–0959), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (*http://www.regulations.gov*), or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov*, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rules'' and insert ''USCG–2009–0959'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the proposed rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, click on the

''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2009–0959'' and click ''Search''. Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting, but you may submit a request using one of the four methods under **ADDRESSES**. Please explain why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register.**

Background and Purpose

The proposed rule would enable the Washington State Department of Transportation, the owner of the Chehalis River Bridge, to operate the draw only if at least one-hour notice is provided at all times. This notice would be given by telephone to 360–533–9360. A marine radio will also be maintained at the bridge, but will only be monitored when a draw tender is present. Currently, one-hour notice is only required between 9 p.m. and 5 a.m.

From June through September 2009 the draw has not opened for large oceangoing vessels. The former ship traffic is now focused seaward of the bridge following the recent closure of timber terminals above the bridge. Currently, the bridge averages only seven openings a month during those daylight hours when a draw operator is present. The Washington State Department requested this change to reduce unnecessary staffing of the drawbridge in light of the infrequent openings requested for the bridge.

The waterway traffic at this drawbridge is composed of recreational vessels and occasional tugs with barges. The Chehalis River is a major tributary of Grays Harbor.

Discussion of Proposed Rule

The Coast Guard proposes to amend 33 CFR Part 117 by revising § 117.1031 Chehalis River to require one-hour notice for draw openings at all times.

Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The Coast Guard has made this determination based on the fact that vessel operators will not be significantly impacted since they will still be able to transit under the bridge by giving one-hour notice.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities because all vessel operators will not be significantly impacted since they will still be able to transit under the bridge by giving one-hour notice.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how, and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or e-mail Austin Pratt, Chief, Bridge Section, Waterways Management Branch, 13th Coast Guard District; telephone 206–220–7282, e-mail *william.a.pratt@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of Information and Regulatory Affairs has not designated this as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, and Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 117.1031 to read as follows:

§ 117.1031 Chehalis River.

The draw of the U.S. 101 highway bridge, mile 0.1, at Aberdeen shall open on signal if at least one-hour notice is given at all times.

Dated: November 10, 2009.

G.T. Blore,

Rear Admiral, U.S. Coast Guard Commander, Thirteenth Coast Guard District.

[FR Doc. E9–28907 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2009–0502; FRL–9088–9]

Approval and Promulgation of Implementation Plans; Kentucky: Revisions to the Kentucky State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Kentucky on December 31, 2008, for the purpose of establishing transportation conformity criteria and procedures related to interagency consultation, and enforceability of certain transportation related control and mitigation measures for the Commonwealth of Kentucky.

DATES: Comments must be received on or before January 4, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2009–0502, by one of the following methods:

1. *http://www.regulations.gov:* Follow the online instructions for submitting comments.

2. *E-mail: Somerville.Amanetta@epa.gov.*

3. *Fax:* 404–562–9019.

4. *Mail:* ''EPA–R04–OAR–2009–0502,'' Air Quality Modeling and Transportation Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

5. *Hand Delivery or Courier:* Ms. Amanetta Somerville, Air Quality Modeling and Transportation Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R04–OAR–2009–0502. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured

and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Amanetta Somerville, Air Quality Modeling and Transportation Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960. Ms. Somerville's telephone number is 404–562–9025. She can also be reached via electronic mail at *Somerville.amanetta@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Transportation Conformity

Transportation conformity (hereafter referred to as ''conformity'') is required under section 176(c) of the Clean Air Act (CAA or Act) to ensure that federally supported highway, transit projects, and other activities are consistent with (''conform to'') the purpose of the SIP. Conformity currently applies to areas that are designated nonattainment, and to areas that have been redesignated to attainment after 1990 (maintenance areas) with plans developed under section 175A of the Act, for the following transportation related criteria pollutants: ozone, particulate matter ($PM_{2.5}$ and PM_{10}), carbon monoxide, and nitrogen dioxide.

Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant criteria pollutants, also known as national ambient air quality standards (NAAQS). The transportation conformity regulation is found in 40 CFR Part 93 and provisions related to conformity SIPs are found in 40 CFR 51.390.

II. Background for This Action

A. Federal Requirements

EPA promulgated the Federal transportation conformity criteria and procedures (''Conformity Rule'') on November 24, 1993 (58 FR 62188). Among other things, the rule required states to address all provisions of the conformity rule in their SIPs frequently referred to as ''conformity SIPs.'' Under 40 CFR 51.390, most sections of the conformity rule were required to be copied verbatim. States were also required to tailor all or portions of the following three sections of the conformity rule to meet their state's individual circumstances: 40 CFR 93.105, which addresses consultation procedures; 40 CFR 93.122(a)(4)(ii), which addresses written commitments to control measures that are not included in a metropolitan planning organization's (MPO's) transportation plan and transportation improvement program that must be obtained prior to a conformity determination, and the requirement that such commitments, when they exist, must be fulfilled; and 40 CFR 93.125(c), which addresses written commitments to mitigation measures that must be obtained prior to a project-level conformity determination, and the requirement that project sponsors must comply with such commitments, when they exist.

On August 10, 2005, the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users'' (SAFETEA–LU) was signed into law. SAFETEA–LU revised section 176(c) of the CAA transportation conformity provisions. One of the changes streamlines the requirements for conformity SIPs. Under SAFETEA–LU, states are required to address and tailor only three sections of the rule in their conformity SIPs: 40 CFR 93.105, 40 CFR 93.122(a)(4)(ii), and, 40 CFR 93.125(c), described above. In general, states are no longer required to submit conformity SIP revisions that address the other sections of the conformity rule. These changes took effect on August 10, 2005, when SAFETEA–LU was signed into law.

B. SIP Submission

On December 31, 2008, the Commonwealth of Kentucky, through the Kentucky Energy and Environment Cabinet's Department of Air Quality (KY DAQ), submitted the Commonwealth's transportation conformity and consultation interagency rule to EPA as an addition to the SIP. The interagency consultation procedures for the transportation conformity partners are outlined in the document Transportation Conformity: A Guide for Interagency Consultation, which is referenced in the Kentucky transportation conformity rule.

The Commonwealth of Kentucky developed its consultation rule based on the elements contained in 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c). As a first step, the Commonwealth worked with the existing transportation planning organization's interagency committee that included representatives from Kentucky's air quality agency, Kentucky Department of Transportation (DOT), U.S. DOT (*i.e.,* Federal Highway Administration—Kentucky Division, Federal Transit Administration), the MPOs of the maintenance and nonattainment areas of Kentucky, and EPA. The interagency committee met regularly and drafted the consultation rules considering elements in 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c), and integrated the local procedures and processes into the rule. The consultation process developed in this rule is for the Commonwealth of Kentucky.

C. Section Description of Nonattainment Areas

Currently, in the Commonwealth of Kentucky, there are 3 maintenance areas and 1 nonattainment area for the 1997 8-hour ozone standard, and 3 nonattainment areas for the 1997 annual $PM_{2.5}$ standard. The conformity SIP has been developed to include all necessary partners in each of the areas listed.

Below provides the details for all of these areas.

1. Clarksville-Hopkinsville Conformity SIP

Effective June 15, 2004, EPA designated Christian County, Kentucky and Montgomery County, Tennessee in the bi-state Clarksville-Hopkinsville area, as nonattainment for the 1997 8-hour ozone standard (69 FR 23858). On January 25, 2006, EPA redesignated the Kentucky portion of the Clarksville-Hopkinsville nonattainment area to attainment for the 1997 8-hour ozone NAAQS (71 FR 4047). In a separate action, the Tennessee portion of this area was also redesignated from nonattainment to attainment for the 1997 8-hour ozone standard.

The Clarksville Urbanized Area Metropolitan Planning Organization (CUAMPO) is the MPO for most of the bi-state Clarksville-Hopkinsville 1997 8-hour ozone maintenance area. CUAMPO's planning boundary includes most of Christian County, Kentucky and Montgomery County, Tennessee in the Clarksville-Hopkinsville area. The areas outside the MPO's planning boundary in Christian County, Kentucky and Montgomery County, Tennessee are considered ''donut'' [a] areas for the purposes of implementing transportation conformity in this area. Per the Transportation Conformity Rule, the MPO's conformity determination is not complete without a regional analysis that considers the projects in the MPO area as well as the donut areas that are within the nonattainment/maintenance area. For the purposes of implementing the 1997 8-hour ozone transportation conformity requirements, CUAMPO serves as the lead agency for the preparation, consultation, and distribution of the conformity determinations. The ''donut'' areas are included in CUAMPO's travel demand model and CUAMPO coordinated the inputs for the model with the Kentucky Transportation Cabinet and the Tennessee DOT.

Christian County, Kentucky, which is a part of the Clarksville-Hopkinsville bi-state maintenance area, does not have a previous conformity SIP. The state of Tennessee will establish conformity procedures for Montgomery County, Tennessee as part of the Clarksville-Hopkinsville maintenance area in their individual conformity SIP. The SIP revision includes the conformity procedures for the Christian County, Kentucky portion of the Clarksville-Hopkinsville bi-state maintenance area.

2. Huntington-Ashland

Effective June 15, 2004, EPA designated Boyd County in Kentucky; and Cabell and Wayne counties in West Virginia as nonattainment for the 1997 8-hour ozone standard. This area is known as the bi-state Huntington-Ashland 1997 8-hour ozone area. The bi-state Huntington-Ashland 1997 8-hour ozone area was designated nonattainment under Subpart 1 of the Act and as such is referred to as a ''basic'' 8-hour ozone nonattainment area. On August 3, 2007, EPA published the redesignation of the Kentucky portion of the Huntington-Ashland (Boyd County) 8-hr ozone nonattainment area to attainment in the **Federal Register** (72 FR 43172). In a separate action, the West Virginia portion of this area was also redesignated from nonattainment to attainment for the 1997 8-hour ozone standard.

Effective April 5, 2005, EPA designated the whole counties of Boyd County in Kentucky, Cabell and Wayne County in West Virginia, and Lawrence and Scioto County in Ohio, as nonattainment for the 1997 $PM_{2.5}$ annual standard. Partial counties of Lawrence County in Kentucky; Mason County in West Virginia; and Adams and Gallia Counties in Ohio were also designated nonattainment for the 1997 $PM_{2.5}$ annual standard as part of the Huntington-Ashland area. The current designation status of the Huntington-Ashland area is nonattainment for the 1997 $PM_{2.5}$ annual standard.

There are two MPOs that are responsible for transportation planning for areas within the Huntington-Ashland 8-hour ozone maintenance and $PM_{2.5}$ nonattainment area. The Five County Area Development District (FIVCO) is the MPO responsible for transportation planning in Boyd County, Kentucky. KYOVA is the other MPO. KYOVA's planning boundary includes Lawrence County, Ohio; and Cabell and Wayne Counties in West Virginia. The partial counties of Lawrence County, Kentucky; Adams and Gallia Counties in Ohio; and Mason County, West Virginia are not within either MPO's planning boundary, and are considered ''donut'' areas for the purposes of implementing transportation conformity in this area. Per the Transportation Conformity Rule, the MPO's conformity determination is not complete without a regional analysis that considers the projects in the MPO area(s) as well as the donut areas that are within the nonattainment/maintenance area. For the purposes of implementing the 1997 8-hour ozone and the 1997 $PM_{2.5}$ annual transportation conformity requirements, FIVCO serves as the lead agency for the preparation, consultation, and distribution of the conformity determinations for the 1997 8-hour ozone standard for Boyd County. FIVCO and KYOVA serve as co-leads for the preparation, consultation, and distribution of the conformity determinations for the 1997 $PM_{2.5}$ annual standard for the entire Huntington Ashland nonattainment area for the 1997 $PM_{2.5}$ annual standard.

Boyd County and the partial county of Lawrence, Kentucky which are a part of the Huntington-Ashland area do not have a previous conformity SIP. The states of Ohio and West Virginia will establish conformity procedures for their respective state in their individual conformity SIPs for Lawrence County, Ohio; and Cabell and Wayne Counties in West Virginia; and the partial counties of Adams and Gallia in Ohio; and Mason County, West Virginia. The SIP revision at issue now includes the conformity procedures for both the partial county of Lawrence and Boyd County, Kentucky in its entirety, for the Huntington-Ashland area.

3. Louisville Conformity SIP

Effective June 15, 2004, EPA designated Clark and Floyd Counties in Indiana; and Bullitt, Jefferson, and Oldham Counties in Kentucky, in the bi-state Louisville area, as nonattainment for the 1997 8-hour ozone standard. On July 5, 2007, EPA redesignated the Kentucky portion of the Louisville nonattainment area to attainment for the 1997 8-hour ozone NAAQS (72 FR 36601). In a separate action, the Indiana portion of this area was also redesignated from nonattainment to attainment for the 1997 8-hour ozone standard.

Effective April 5, 2005, EPA designated Madison Township of Jefferson County; and Clark and Floyd Counties in Indiana; and Bullitt and Jefferson Counties in Kentucky, in the bi-state Louisville area, as nonattainment for the 1997 $PM_{2.5}$ annual standard. The current designation status of the Louisville bi-state area is nonattainment for the 1997 $PM_{2.5}$ annual standard.

The Kentuckiana Regional Planning & Development Agency (KIPDA) is the MPO for the entire bi-state Louisville 1997 8-hour ozone area, and for most of the bi-state Louisville 1997 $PM_{2.5}$ annual area. KIPDA's planning boundary includes Clark and Floyd Counties in Indiana; and Bullitt, Jefferson and Oldham Counties in Kentucky. Madison

[a] Donut areas are geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment or maintenance area that contains any part of a metropolitan area.

Township of Jefferson County, Indiana is not within the KIPDA planning boundary, and thus is considered a ''donut'' area for the purposes of implementing transportation conformity in this area. Per the Transportation Conformity Rule, the MPO's conformity determination is not complete without a regional analysis that considers the projects in the MPO area as well as the donut areas that are within the nonattainment/maintenance area. For the purposes of implementing the 1997 8-hour ozone and the $PM_{2.5}$ annual transportation conformity requirements, KIPDA serves as the lead agency for the preparation, consultation, and distribution of the conformity determinations. KIPDA coordinated with the Indiana DOT for travel-related information for Madison Township.

Bullitt, Jefferson, and Oldham Counties in Kentucky which are a part of the Louisville bi-state area do not have a previous conformity SIP. The State of Indiana will establish conformity procedures for the counties that make up the Indiana portion of the bi-state Louisville area in their individual conformity SIP. The SIP revision at issue now includes the conformity procedures for the Bullitt, Jefferson, and Oldham Counties in Kentucky which are a part of the Louisville bi-state area.

4. Northern Kentucky-Cincinnati Conformity SIP

Effective June 15, 2004, EPA designated the Ohio counties of Butler, Clermont, Clinton, Hamilton and Warren; the Kentucky counties of Boone, Campbell and Kenton; and a portion of Dearborn County in Indiana in the tri-state Northern Kentucky-Cincinnati area, as nonattainment for the 1997 8-hour ozone standard. The tri-state Northern Kentucky-Cincinnati 1997 8-hour ozone area was designated nonattainment under Subpart 1 of the CAA and as such is referred to as a ''basic'' 8-hour ozone nonattainment area.

Effective April 5, 2005, EPA designated the Ohio counties of Butler, Clermont, Clinton, Hamilton and Warren; the Kentucky counties of Boone, Campbell and Kenton; and a portion of Dearborn County in Indiana in the tri-state Northern Kentucky-Cincinnati area, as nonattainment for the $PM_{2.5}$ standard. The current designation status of both the tri-state Northern Kentucky-Cincinnati 1997 8-hour ozone and $PM_{2.5}$ areas is nonattainment.

The Ohio, Kentucky, Indiana Regional Council of Governments (OKI) is the MPO for most of the Northern Kentucky-Cincinnati 1997 8-hour ozone and $PM_{2.5}$ areas. OKI's planning boundary includes the Ohio counties of Butler, Clermont, Hamilton and Warren; the Kentucky counties of Boone, Campbell and Kenton; and Dearborn County, Indiana. Clinton County, Ohio is not within the OKI's planning boundary, and thus is considered a ''donut'' area for the purposes of implementing transportation conformity in this area. Per the Transportation Conformity Rule, the MPO's conformity determination is not complete without a regional analysis that considers the projects in the MPO area as well as the donut areas that are within the nonattainment/maintenance area. For the purposes of implementing the 1997 8-hour ozone and 1997 $PM_{2.5}$ annual transportation conformity requirements, OKI served as the lead agency for the preparation, consultation, and distribution of the conformity determinations. OKI coordinated with the Ohio DOT for travel-related information for Clinton County.

Boone, Campbell and Kenton Counties in Kentucky which are a part of the Northern Kentucky-Cincinnati tri-state area do not have a previous conformity SIP. The States of Indiana and Ohio will establish conformity procedures for the counties that make up the Indiana and Ohio portions of the Northern Kentucky-Cincinnati area in their individual conformity SIPs. The SIP revision at issue now includes the conformity procedures for Boone, Campbell and Kenton Counties in Kentucky which are a part of the Northern Kentucky-Cincinnati tri-state area.

III. Proposed Action

EPA is proposing to approve the Kentucky SIP revision consisting of the transportation conformity section. This addition consists of transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation-related control measures and mitigation measures. The intended effect is to establish the transportation conformity criteria and procedures in the Kentucky SIP.

On December 31, 2008, the Commonwealth of Kentucky, through the Kentucky Energy and Environment Cabinet's KY DAQ, submitted the State's transportation conformity and consultation interagency rule to EPA as an addition to the SIP. The Kentucky transportation conformity rule establishes procedures for interagency consultation for existing and future nonattainment and maintenance areas for certain transportation-related pollutants.

The Commonwealth of Kentucky developed its consultation rule based on the elements contained in 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c). As a first step, the Commonwealth worked with the existing transportation planning organization's interagency committee that included representatives from the State air quality agency, State DOT, Federal Highway Administration—Kentucky Division, Federal Transit Administration, the MPOs of the maintenance and nonattainment areas of Kentucky, and EPA. The interagency committee met regularly and drafted the consultation rules considering elements in 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c), and integrated the local procedures and processes into the rule. The consultation process developed in this rule is for the Commonwealth of Kentucky. On July 29, 2008, KY DAQ held a public hearing for the transportation conformity rulemaking.

EPA has evaluated this SIP and has determined that the Commonwealth has met the requirements of Federal transportation conformity rule as described in 40 CFR Part 51, Subpart T and 40 CFR Part 93, Subpart A. KY DAQ has satisfied the public participation and comprehensive interagency consultation requirement during development and adoption of the consultation procedures at the local level. Therefore, EPA is proposing to approve the rule as an addition to the Kentucky SIP. EPA's rule requires the states to develop their own processes and procedures for interagency consultation among the Federal, state, and local agencies, and resolution of conflicts meeting the criteria in 40 CFR 93.105. The SIP revision must include processes and procedures to be followed by the MPO, state DOT, and U.S. DOT in consulting with the state and local air quality agencies and EPA before making transportation conformity determinations. The transportation conformity SIP addition must also include processes and procedures for the state and local air quality agencies and EPA to coordinate the development of applicable SIPs with MPOs, state DOTs, and U.S. DOT. Kentucky's revision includes these required elements.

EPA has reviewed the submittal to assure consistency with the CAA as amended by SAFETEA–LU and EPA regulations (40 CFR Part 93 and 40 CFR 51.390) governing state procedures for transportation conformity and interagency consultation and has concluded that the submittal is

approvable. Details of our review are set forth in a technical support document (TSD), which has been included in the docket for this action. Specifically, in the TSD, we identify how the submitted procedures satisfy our requirements under 40 CFR 93.105 for interagency consultation with respect to the development of transportation plans and programs, SIPs, and conformity determinations, the resolution of conflicts, and the provision of adequate public consultation, and our requirements under 40 CFR 93.122(a)(4)(ii) and 93.125(c) for enforceability of control measures and mitigation measures.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 20, 2009.

Beverly H. Banister,

Acting Regional Administrator, Region 4.

[FR Doc. E9–28970 Filed 12–3–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–R04–OAR–2009–0793; FRL–9089–3]

Approval of Section 112(l) Authority for Hazardous Air Pollutants; Equivalency by Permit Provisions; National Emission Standards for Hazardous Air Pollutants; Plywood and Composite Wood Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to section 112(l) of the Clean Air Act, EPA is proposing to amend regulations to expand the North Carolina Department of Environment and Natural Resources equivalency by permit program coverage to include all 32 sources in North Carolina that are subject to the plywood and composite wood products rule.

DATES: Comments must be received in writing by January 4, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2009–0793, by one of the following methods:

1. *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.

2. *E-mail: page.lee@epa.gov*.

3. *Fax:* 404–562–9095.

4. *Mail:* ''EPA–R04–0AR–2009–0793'', Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

5. *Hand Delivery or Courier:* Lee Page, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 am to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Lee Page, Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9131. Mr. Page can also be reached via electronic mail at *page.lee@epa.gov*.

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is publishing a direct final rule for this action without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. A detailed rationale for the rule amendment is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: November 16, 2009.

J Scott Gordon,

Acting Regional Administrator, Region 4.

[FR Doc. E9–28968 Filed 12–3–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 1, 61 and 69

[WC Docket No. 05–25; RM–10593; DA 09–2388]

Parties Asked To Comment on Analytical Framework Necessary To Resolve Issues in the Special Access Notice of Proposed Rulemaking

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document invites interested parties to comment on the appropriate analytical framework for examining the various issues that have been raised in the rulemaking proceeding on special access services pending before the Commission.

DATES: Comments are due on or before January 19, 2010 and reply comments are due on or before February 17, 2010.

ADDRESSES: You may submit comments, identified by WC Docket No. 05–25 and RM–10593, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Federal Communications Commission's Web site: *http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- E-mail: *ecfs@fcc.gov*, and include the following words in the body of the message: ''get form.'' A sample form and directions will be sent in response.
- First-class or overnight U.S. Postal Service mail: Secretary, Federal Communications Commission, 445 12th Street, SW., Washington DC 20554.

Detailed instructions for submitting comments, including how to submit comments by hand, messenger delivery or by commercial overnight courier, and additional information on the rulemaking process are contained in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Marvin Sacks, Wireline Competition Bureau, Pricing Policy Division (202) 418–2017, *marvin.sacks@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice, DA 09–2388, released on November 5, 2009. The full text of this document is available for public inspection during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Washington, DC 20554 and may be viewed on the Commission's Web site at *http://www.fcc.gov/*.

Pursuant to the Commission's rules governing notices of proposed rulemakings, 47 CFR 1.415, 1.419, the Commission invites interested parties to comment on an appropriate analytical framework for examining the various issues raised in the *Special Access NPRM*, 70 FR 19381, April 13, 2005. The term ''special access services'' encompasses all services that do not use local switches; these include services that employ dedicated facilities that run directly between the end user and an IXC's point of presence, where an IXC connects its network with the LEC network, or between two discrete end user locations. In the *Special Access NPRM*, the Commission explained that an examination of the current state of competition for special access facilities is critical to determine whether the Commission's pricing flexibility rules have worked as intended. The Commission invited comment on whether the available data and actual marketplace developments support the predictive judgments that underlie the special access pricing flexibility rules. 47 CFR 69.701 *et seq*. In addition, the Commission sought comment on appropriate measures to ensure that price cap rates for special access services remain just and reasonable after expiration of the CALLS Plan. Subsequently, in the *Special Access Refresh the Record PN*, 72 FR 40814, July 25, 2007, the Commission sought updated information on these issues, and parties continue to provide their views to Commission staff.

Some parties assert that the Commission's current rules are working as intended and contend there is extensive actual and potential competition in the market for special access. Other parties assert that there is little or no competition for special access services, and the current pricing flexibility and price cap regulations have resulted in supracompetitive prices and significant overearning by incumbents. The Commission would benefit from a clear explanation by the parties of how it should use data to determine systematically whether the current price cap and pricing flexibility rules are working properly to ensure just and reasonable rates, terms, and conditions and to provide flexibility in the presence of competition.

Therefore, in the Public Notice, the Commission seeks concrete suggestions on the appropriate analytical framework for determining whether the current rules are working. For example, should the Commission use a market power analysis to assess the current special access regulatory regime? Suggestions should be both analytically rigorous (i.e., fact-based and systematic) and administratively practical (i.e., requiring a manageable amount of data collection and analysis). Once the Commission adopts an analytical approach enabling a systematic determination of whether or not the current regulation of special access services is ensuring rates, terms, and conditions that are just and reasonable as required by the Act, 47 U.S.C. 201(b), it can determine what, if any, specific problems there are with the current regime and formulate specific solutions as necessary. The analytical framework that parties propose should address how to answer key questions raised in the Special Access NPRM, including:

1. Do the Commission's pricing flexibility rules ensure just and reasonable rates?

(A) Are the pricing flexibility triggers, which are based on collocation by competitive carriers, an accurate proxy for the kind of sunk investment by competitors that is sufficient to constrain incumbent LEC prices, including for both channel terminations and inter-office facilities?

(B) If so, are the triggers set at an appropriate level?

2. Do the Commission's price cap rules ensure just and reasonable special access rates?

3. Do the Commission's price cap and pricing flexibility rules ensure that terms and conditions in special access tariffs and contracts are just and reasonable?

Parties should focus their comments on the analytical framework, including applicable law, they believe the Commission should use to arrive at fact-based answers to each of the key questions above. Parties should address whether, in applying their proposed analytical framework, the Commission can answer the questions based upon data contained in the existing record. If so, what record data must the Commission examine to answer the question? If not, precisely what additional data should the Commission collect and from whom, and why? Parties should also identify and address administrative concerns and practical considerations, such as obstacles to obtaining or evaluating specified data, and the time frame they believe would be required to perform their proposed analysis. To facilitate the Commission's review, parties are encouraged to

organize their comments by the key question numbers used in the Public Notice. If a party believes additional questions must be resolved, it should set forth the questions, provide an analytical framework to answer such questions, and describe the data necessary to answer the questions.

For purposes of illustration, the Public Notice included examples, which are based on the record in the special access proceeding, of proposed analytical frameworks. These examples are not intended to limit the types of analytical framework or data collection parties suggest in responding to the Public Notice, but rather to highlight some of the general arguments of which the Commission is aware.

Paperwork Reduction Act Analysis

This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). This document invites interested parties to comment on the appropriate analytical framework for examining the various issues that have been raised in the rulemaking proceeding on special access services pending before the Commission.

Procedural Matters

Ex Parte Requirements

This matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. 47 CFR 1.1200 *et seq.* Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. 47 CFR 1.1206(b)(2). Other rules pertaining to oral and written presentations are set forth at 47 CFR 1.1206(b).

Comment Filing Procedures

Pursuant to Commission rules governing notices of proposed rulemakings, interested parties may file comments on or before January 19, 2010 and reply comments on or before February 17, 2010. 47 CFR 1.415, 1.419. All pleadings must reference WC Docket No. 05–25 and RM–10593. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1, 1998. Comments may be filed electronically using the Internet by accessing the ECFS at *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the websites for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appears in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message: ''get form.'' A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). Parties are strongly encouraged to file comments electronically using the Commission's ECFS. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission.

The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

Parties should also send a copy of their filings to Margaret Dailey, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5–A232, 445 12th Street, SW., Washington, DC 20554, or by e-mail to *margaret.dailey@fcc.gov*. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 488–5300 or (800) 378–3160, or via e-mail to *fcc@bcpiweb.com*.

Documents in WC Docket No. 05–25 and RM–10593 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Washington, DC 20554. The documents may also be purchased from BCPI, Web site *http://www.bcpiweb.com*, telephone (202) 488–5300 or (800) 378–3160, facsimile (202) 488–5563, TTY (202) 488–5562, e-mail *fcc@bcpiweb.com*. These documents may also be viewed on the Commission's Web site at *http://www.fcc.gov/*. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format) or to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies).

47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Telecommunications.

47 CFR Parts 61 and 69

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission.

Kirk S. Burgee,

Chief of Staff, Wireline Competition Bureau.

[FR Doc. E9–29019 Filed 12–3–09; 8:45 am]

BILLING CODE 6712–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 552 and 570

[GSAR Case 2006–G508; Docket 2009–0017; Sequence 1]

RIN 3090–AI96

General Services Administration Acquisition Regulation; GSAR Case 2006–G508; Rewrite of Part 570, Acquiring Leasehold Interests in Real Property

AGENCY: Office Acquisition Policy, General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: The General Services Administration (GSA) is proposing to amend the GSA Acquisition Regulation (GSAR) to revise sections of GSAR part 570 that provide requirements for acquiring leasehold interests in real property.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before February 2, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2006–G508 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''GSAR Case 2006–G508'' under the heading ''Enter Key Word or ID''. Follow the instructions provided to ''Submit a Comment''. Please include your name, company name (if any), and ''GSAR Case 2006–G508'' on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat, 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2006–G508 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Beverly Cromer at (202) 501–1448. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (MVPR), Room 4041, 1800 F Street, NW., Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2006–G508.

SUPPLEMENTARY INFORMATION:

A. Background

GSA is amending the GSAR to revise GSAR part 570, Acquiring Leasehold Interests in Real Property. This proposed rule is a result of the GSA Acquisition Manual (GSAM) rewrite initiative. The initiative was undertaken by GSA to revise the GSAM to maintain consistency with the Federal Acquisition Regulation (FAR) and implement streamlined and innovative acquisition procedures that contractors, offerors, and GSA contracting personnel can use when entering into and administering contractual relationships. The GSAM incorporates the GSAR as well as internal agency acquisition policy.

GSA will rewrite each part of the GSAR and GSAM, and as each GSAR part is rewritten, GSA will publish it in the **Federal Register**.

This proposed rule revises GSAR part 570 as follows: Overall changes were made throughout the text to change ''you'' to ''contracting officer'', and to edit language for clarity.

GSAR 570.101(b) is revised to delete GSAR rules that are no longer applicable to the acquisition of leasehold interests in real property and to add current references to GSAR 522.805, 522.807, and 532.111.

GSAR 570.101(c) is revised to update the GSAR provisions that are applicable in leasing transactions. This section is revised to delete GSAM sections from the GSAR and move them to the GSAM, the non-regulatory portion of the manual. GSAR 570.101(d) is added to explain that the FAR does not apply to leasehold acquisitions of real property and to further explain that references to the FAR in GSAR part 570 are used as a matter of policy where the underlying statute behind the FAR provision applies to leasing or as matter of administrative convenience.

GSAR 570.102 is revised to add definitions for ''lease acquisition'', ''lease extension'', ''lease renewal (option)'', ''succeeding lease'', ''superseding lease,'' and ''usable square feet''. The definition for ''simplified lease acquisition threshold'' is revised to delete the dollar value, and instead reference FAR 2.101 for information about the threshold. The definition for ''small business'' is revised to delete the dollar limit for annual average gross receipts and to reference the size standard established by the Small Business Administration. Further revisions were made to include where the size standards may be found on the Web. The definition for ''space in buildings'' is deleted because this definition was only referenced at GSAR 570.105–3, which is also being deleted.

GSAR 570.103 is revised to update the statutory reference to leasing authority. In addition, GSAR 570.103 is revised, consistent with statute and regulation, to allow the contracting officer to designate a contracting officer's representative.

GSAR 570.105–2 is re-titled Criteria for the use of two-phase design-build. GSAR 570.105–2 is revised to update the statutory reference to leasing authority. GSAR 570.105–2(c) is added to reference 570.305, where additional procedures can be found regarding two-phase design-build selections that apply to acquisition of leasehold interests. GSAR 570.105–3 is deleted in its entirety because sealed bidding is not used in GSA leasing transactions.

GSAR 570.106 is re-titled Advertising, Publicizing, and Notifications to Congress, and revised to incorporate advertising requirements from GSAR part 505, because most of the exceptions to advertising requirements contained in GSAR part 505 relate to the leasing program.

GSAR 570.106–1, Synopsis of lease awards, is added to incorporate synopsizing requirements of lease awards from GSAR part 505.

GSAR 570.108 is revised to update reference to ''Excluded Parties List System'' (EPLS).

GSAR 570.109 is revised to add the language ''representations and'' for clarification.

GSAR 570.110 is revised to require the contracting officer to obtain two bids or cost and pricing data for price analysis of offered tenant improvement costs.

GSAR 570.111 is revised to require that the inspection and acceptance document contain the usable square footage accepted and the acceptance date.

GSAR 570.115, Novation and Change of Ownership, is added to include language stating that FAR subpart 42.12 applies in the event of a transfer of ownership of the leased premises or a change in the lessor's legal name.

GSAR 570.116, Contract Format, is added to include language stating that the uniform contract format is not required for leases of real property.

GSAR 570.117, Sustainable requirements for lease acquisitions, is added to add a requirement for the contracting officer to include sustainable design requirements appropriate for the type of leasing action in solicitations for offers and to provide that the solicitation requirements and instructions are listed on *http://gsa.gov/leasing.*

GSAR 570.203–3(a), is revised to add a reference to ''GSA Form 3626'' for clarity and to require the contracting officer to include sustainable design requirements in offers.

GSAR 570.203–4 is revised to include a reference to the thresholds at FAR 15.403–4 and 19.702(a). It is further revised to require that the contracting officer make an affirmative determination of price reasonableness.

GSAR subpart 570.3 is renamed Acquisition Procedures for Leasehold Interests in Real Property Over the Simplified Lease Acquisition Threshold.

GSAR 570.303–1 is revised to add a requirement that each solicitation of offers (SFO) must include sustainable design requirements.

GSAR 570.303–2 is revised to allow electronic issuance of solicitations.

GSAR 570.303–4 is revised to require contracting officers to re-advertise and reissue a solicitation when a complete revision of a solicitation is required in accordance with GSAR 570.106.

GSAR 570.304 is revised to adequately distinguish between best value and low price technically acceptable acquisitions.

GSAR 570.305 is revised to require the contracting officer to consider planned subcontracting opportunities for small disadvantaged business concerns during phase one evaluations.

GSAR 570.306(b) is revised to require the contracting officer to review the elements of the lessor's proposed rent to analyze whether the individual elements are realistic and reflect the lessor's understanding of work to be performed.

GSAR 570.306(c) is revised to add information on past performance evaluations.

GSAR 570.306(f) is revised to direct the reader to important paragraphs in part 570 concerning the evaluation of offers.

GSAR 570.401 is revised to add language indicating that if a renewal option was not evaluated as part of the lease at award, then the addition of a renewal option during the lease term must satisfy the requirements of GSAM 506 regarding full and open competition.

GSAR 570.402–2 is revised to update the reference to publication and advertising requirements for leases.

GSAR 570.402–5(a) is revised to add language to emphasize that relocation costs are to be used in price evaluations.

GSAR 570.402–6 is revised to provide clarification on how to conduct a cost-benefit analysis.

GSAR 570.403 is revised for clarity to refer to the cost-benefit analysis in 570.402–6 when identifying other potentially suitable properties.

GSAR 570.404 is revised to clarify that a superseding lease may be used when market conditions warrant renegotiation of an existing lease, and to provide considerations of a cost-benefit analysis.

GSAR 570.405 is revised to provide examples of situations where lease extensions may be appropriate.

GSAR 570.501(a) is revised to explain that the procedures in 570.502 apply to alterations acquired directly from a lessor by modification or supplemental lease agreement.

GSAR 570.502 is deleted because this information is addressed in 570.501(a).

GSAR 570.502–1 is revised to tie the threshold to the FAR definition of the micro-purchase threshold.

GSAR 570.502–2 is revised to delete language that refers to an obsolete form, GSA Form 300, and allow the lease contracting officer to delegate alteration contracting authority to a warranted contracting officer's representative in GSA or the tenant agency.

GSAR 570.503 is revised to delete paragraph (b) from the GSAM and incorporate it into the GSAR.

GSAR subpart 570.6 is renumbered as GSAR subpart 570.7 and a new GSAR Subpart 570.6, Contracting for Overtime Services and Utilities in Leases is added to provide requirements for when overtime services and utilities.

GSAR 570.601 is renumbered as 570.701 and is revised to delete the reference to the dollar value of the thresholds, and to instead provide the FAR reference because the thresholds may change.

GSAR 570.601 is revised to include additional FAR provisions or clauses that must be included in solicitations.

GSAR 570.602 and 570.603 are renumbered as 570.702 and 703, respectively, and are revised to require the contracting officer to document the file when deleting or substantially changing a clause. GSAR 570.603 is further revised to number the paragraphs (a) and (b), and to include language in paragraphs (a) and (b) to require the contracting officer to include the following additional clauses in leaseholds for real property:

552.215–70, Examination of Records by GSA;

552.270–28, Mutuality of Obligation;

552.270–29, Acceptance of Space;

552.270–30, Price Adjustment for Illegal or Improper Activity;

552.270–31, Prompt Payment; and

552.270–32, Covenant Against Contingent Fees.

GSAR 570.604 is renumbered as 570.704 and is revised to delete the reference to GSAR clause 552.203–5, Covenant Against Contingent Fees, because the updated clause number is now referenced in 570.703.

GSAR 570.701 is renumbered as 570.801 and is revised to delete the instructions to omit the reference to Standard Form 2–A.

GSAR 570.802(d) is added to allow the use of the GSA Form 1217, Lessor's Annual Cost Statement, to obtain pricing information regarding offered services and lease commissions.

The clause at GSAR 552.270–1, Instructions to Offerors-Acquisition Leasehold Interest in Real Property, is revised to add language requiring execution and delivery of a lease to effectuate contract formation. It also adds paragraph (f) to address paperwork collection information.

The provision at GSAR 552.270–3, Parties to Execute Leases, is revised to make it consistent with the instructions contained in FAR 4.102.

The clause at GSAR 552.270–7, Fire and Casualty Damage, is revised to permit the government to assess a property's condition before giving notice of termination.

The clause at GSAR 552.270–14, Changes, is revised to specify the impact of the failure to assert a claim for a price adjustment.

The clause at GSAR 552.270–16, Adjustment for Vacant Premises, is revised to clarify when and how adjustments for vacant premises will be made.

The clause at GSAR 552.270–29, Acceptance of Space, is revised to simplify the reference to a section in the solicitation.

The clause at GSAR 552.203.70, Price Adjustment for Illegal or Improper Activity, is relocated from GSAR part 503 to GSAR part 570 and, as a result, is renumbered as GSAR 552.270–30.

The clause at GSAR 552.232–75, Prompt Payment, is relocated from GSAR part 532 to GSAR part 570 and, as a result, is renumbered as GSAR 552.270–31. This clause is also revised to add paragraph (d) Overpayments, to give instructions to the contractor in cases where the Government has overpaid.

The clause at GSAR 552.203–5, Covenant Against Contingent Fees, is relocated from GSAR part 503 to GSAR part 570 and, as a result, is renumbered as GSAR 552.270–32.

Discussion of Comments

There were no public comments received in response to the ''Advanced Notice of Proposed Rulemaking'' pertaining to this GSAR part.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the revisions are not considered substantive. The revisions delete obsolete coverage, clarify existing coverage, and edit current language. An ''Initial Regulatory Flexibility Analysis'' has therefore, not been performed. We invite comments from small businesses and other interested parties. GSA will consider comments from small businesses concerning the affected GSAR part 570 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (GSAR case 2006–G508), in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat has submitted a request for approval of a new information collection requirement concerning GSAR Case 2006–G508 to the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

Annual Reporting Burden

At GSAR 570.702(d), the contracting officer may use GSA Form 1217, Lessor's Annual Cost Statement, to obtain pricing information regarding offered services and lease commissions.

The annual reporting burden is estimated as follows:

Respondents: 5,733.

Responses per respondent: 1.

Total annual responses: 5,733.

Preparation hours per response: 1 hour.

Total response burden hours: 5,733.

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

An existing OMB clearance, OMB Control No. 3090–0086, covers the information contained in GSAR 570.702(c), GSA Form 1364, Proposal To Lease Space. In this instance, the PRA does not apply because the proposed changes to the GSAM do not impose information collection requirements that require the approval of OMB under 44 U.S.C. 3501, *et seq.*

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than February 2, 2010 to: GSAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (MVPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the GSAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (MVPR), Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 3090–00XX, GSAR Case 2006–G508, Acquiring Leasehold Interests in Real Property, in all correspondence.

List of Subjects in 48 CFR Parts 552 and 570

Government procurement.

Dated: November 5, 2009.

David A. Drabkin,

Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.

Therefore, GSA proposes to amend 48 CFR parts 552 and 570 as set forth below:

1. The authority citation for 48 CFR parts 552 and 570 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. Amend section 552.270–1 by—

a. Removing from the clause heading ''(MAR 1998)'' and adding ''([DATE])'' in its place;

b. Revising in paragraph (a) the definition ''In writing or written'';

c. Removing from paragraph (c)(2)(i)(A) ''the 5th'' and adding ''the fifth'' in its place;

d. Removing from paragraph (c)(2)(i)(E) ''the Contracting'' and adding ''that the Contracting'' in its place;

e. Revising paragraph (e)(7); and

f. Adding paragraph (f).

The revised and added text reads as follows:

552.270–1 Instructions to Offerors—Acquisition of Leasehold Interests in Real Property.

* * * * *

(a) * * *

In writing, writing, or written means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

* * * * *

(e) * * *

(7) The execution and delivery of the Lease contract by the Government establishes a valid award and contract.

* * * * *

(f) *Paperwork collection.* The information collection requirements contained in this solicitation/contract are either required by regulation or approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090–0163.

3. Amend section 552.270–3 by—

a. Removing from the clause heading ''(SEP 1999)'' and adding ''([DATE])'' in its place;

b. Revising paragraphs (a) and (b);

c. Removing from paragraph (c) ''shall be signed with'' and adding ''must be signed in'' in its place; and

d. Adding paragraphs (d) and (e).

The revised and added text reads as follows:

552.270–3 Parties to Execute Lease.

* * * * *

(a) If the lessor is an individual, that individual shall sign the lease. A lease with an individual doing business as a firm shall be signed by that individual, and the signature shall be followed by the individual's typed, stamped, or printed name and the words, ''an individual doing business as _____ [insert name of firm]''.

(b) If the Lessor is a partnership, the lease must be signed in the partnership name, followed by the name of the legally authorized partner signing the same, and a copy of either the partnership agreement or current Certificate of Limited Partnership shall accompany the lease.

* * * * *

(d) If the Lessor is a joint venture, the lease must be signed by each participant in the joint venture in the manner prescribed in paragraphs (a) through (c) of this provision for each type of participant. When a corporation is participating in the joint venture, the corporation shall provide evidence that the corporation is authorized to participate in the joint venture.

(e) If the lease is executed by an attorney, agent, or trustee on behalf of the Lessor, an authenticated copy of his/her power of attorney, or other evidence to act on behalf of the Lessor, must accompany the lease.

552.270–7 [Amended]

4. Amend section 552.270–7 by removing from the clause heading ''(SEP 1999)'' and adding ''([DATE])'' in its place, and removing from the second sentence of the clause ''days of the fire or other casualty;'' and adding ''days after such determination;'' in its place.

5. Amend section 552.270–14 by removing from the clause heading ''(SEP 1999)'' and adding ''([DATE])'' in its place, and revising paragraph (c) to read as follows:

552.270–14 Changes.

* * * * *

(c) The Lessor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the change order and must submit a proposal for adjustment. The Lessor's failure to assert its right for adjustment within the time frame specified herein shall be a waiver of the Lessor's right to an adjustment under this paragraph. Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause excuses the lessor from proceeding with the change as directed.

* * * * *

6. Revise section 552.270–16 to read as follows:

552.270–16 Adjustment for Vacant Premises.

As prescribed in 570.603, insert the following clause:

Adjustment for Vacant Premises ([DATE])

(a) If the Government fails to occupy any portion of the leased premises or vacates the premises in whole or in part before the lease term expires, the rental rate will be reduced. The reduction shall occur after the Government gives 30 calendar days' notice to the Lessor, and shall continue in effect until the Government occupies or reoccupies the vacant premises or the lease expires or is terminated.

(b) The rate will be reduced by that portion of the costs per usable square foot of operating expenses not required to maintain the space. In addition, at the first operating cost adjustment after the notice of reduction to the rent, the base cost of services subject to escalation will be reduced by said amount. In the event that the Government occupies or reoccupies the vacant premises on the lease anniversary date following the occupation of the vacant premises, the base cost of services subject to escalation will be increased by said amount.

(c) The reduction in operating costs shall be negotiated and stated in the lease.

(End of clause)

7. Amend section 552.270–29 by removing from the clause heading ''(SEP 1999)'' and adding ''([DATE])'' in its place, and revising paragraph (b) to read as follows:

552.270–29 Acceptance of Space.

* * * * *

(b) The Government will accept the space and the lease term will begin after determining that the space is substantially complete and contains the required usable square footage as indicated in the solicitation paragraph, Amount and Type of Space.

8. Add section 552.270–30 to read as follows:

552.270–30 Price Adjustment for Illegal or Improper Activity.

As prescribed in 570.603, insert the following clause:

Price Adjustment for Illegal or Improper Activity ([DATE])

(a) If the head of the contracting activity (HCA) or his or her designee determines that there was a violation of subsection 27(a) of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), as implemented in the Federal Acquisition Regulation, the Government, at its election, may—

(1) Reduce the monthly rental under this lease by five percent of the amount of the rental for each month of the remaining term of the lease, including any option periods, and recover five percent of the rental already paid;

(2) Reduce payments for alterations not included in monthly rental payments by five percent of the amount of the alterations agreement; or

(3) Reduce the payments for violations by a Lessor's subcontractor by an amount not to exceed the amount of profit or fee reflected in the subcontract at the time the subcontract was placed.

(b) Prior to making a determination as set forth above, the HCA or designee shall provide to the Lessor a written notice of the action being considered and the basis therefor. The Lessor shall have a period determined by the agency head or designee, but not less than 30 calendar days after receipt of such notice, to submit in person, in writing, or through a representative, information and argument in opposition to the proposed reduction. The agency head or designee may, upon good cause shown, determine to deduct less than the above amounts from payments.

(c) The rights and remedies of the Government specified herein are not exclusive, and are in addition to any other rights and remedies provided by law or under this lease.

(End of clause)

9. Add section 552.270–31 to read as follows:

552.270–31 Prompt Payment.

As prescribed in 570.603, insert the following clause:

Prompt Payment (Sep 1999)

The Government will make payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. All days referred to in this clause are calendar days, unless otherwise specified.

(a) Payment due date.

(1) *Rental payments.* Rent shall be paid monthly in arrears and will be due on the first workday of each month, and only as provided for by the lease.

(i) When the date for commencement of rent falls on the 15th day of the month or earlier, the initial monthly rental payment under this contract shall become due on the first workday of the month following the month in which the commencement of the rent is effective.

(ii) When the date for commencement of rent falls after the 15th day of the month, the initial monthly rental payment under this contract shall become due on the first workday of the second month following the month in which the commencement of the rent is effective.

(2) *Other payments.* The due date for making payments other than rent shall be the later of the following two events:

(i) The 30th day after the designated billing office has received a proper invoice from the Contractor.

(ii) The 30th day after Government acceptance of the work or service. However, if the designated billing office fails to annotate the invoice with the actual date of receipt, the invoice payment due date shall be deemed to be the 30th day after the Contractor's invoice is dated, provided a proper invoice is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(b) *Invoice and inspection requirements for payments other than rent.*

(1) The Contractor shall prepare and submit an invoice to the designated billing office after completion of the work. A proper invoice shall include the following items:

(i) Name and address of the Contractor.

(ii) Invoice date.

(iii) Lease number.

(iv) Government's order number or other authorization.

(v) Description, price, and quantity of work or services delivered.

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the remittance address in the lease or the order).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.

(2) The Government will inspect and determine the acceptability of the work performed or services delivered within seven days after the receipt of a proper invoice or notification of completion of the work or services unless a different period is specified at the time the order is placed. If actual acceptance occurs later, for the purpose of determining the payment due date and calculation of interest, acceptance will be deemed to occur on the last day of the seven day inspection period. If the work or service is rejected for failure to conform to the technical requirements of the contract, the seven days will be counted beginning with receipt of a new invoice or notification. In either case, the Contractor is not entitled to any payment or interest unless actual acceptance by the Government occurs.

(c) *Interest Penalty.*

(1) An interest penalty shall be paid automatically by the Government, without request from the Contractor, if payment is not made by the due date.

(2) The interest penalty shall be at the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date. This rate is referred to as the ''Renegotiation Board Interest Rate,'' and it is published in the **Federal Register** semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date.

(3) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233–1, Disputes, or for more than one year. Interest penalties of less than $1.00 need not be paid.

(4) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233–1, Disputes.

(d) *Overpayments.* If the Lessor becomes aware of a duplicate payment or that the Government has otherwise overpaid on a payment, the Contractor shall—

(1) Return the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(i) Circumstances of the overpayment (*e.g.,* duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(ii) Affected lease number;

(iii) Affected lease line item or subline item, if applicable; and

(iv) Lessor point of contact.

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(End of clause)

Alternate I (Sep 1999). If Alternate I is used, subparagraph (a)(1) of the basic clause should be designated as paragraph (a) and subparagraph (a)(2) and paragraph (b) should be deleted. Paragraph (c) of the basic clause should be redesignated (b).

10. Add section 552.270–32 to read as follows:

552.270–32 Covenant Against Contingent Fees.

As prescribed in 570.603, insert the following clause:

Covenant Against Contingent Fees ([DATE])

(a) The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover the full amount of the contingent fee.

(b) *Bona fide agency,* as used in this clause, means an established commercial or selling agency (including licensed real estate agents or brokers), maintained by a Contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

Bona fide employee, as used in this clause, means a person, employed by a Contractor and subject to the Contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

Contingent fee, as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

Improper influence, as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

(End of clause)

PART 570—ACQUIRING LEASEHOLD INTERESTS IN REAL PROPERTY

11. Amend section 570.101 by revising the table in paragraph (b), and adding paragraphs (c) and (d) to read as follows:

570.101 Applicability.

* * * * *

(b) * * *

GSAR Rules Applicable to Acquisitions of Leasehold Interests in Real Property

501	515.209–70	519.12	536.271
502	515.305	522.805	537.2
503	517.202	522.807	552
509.4	517.207	532.111	553
514.407	519.7	533	

(c) The following GSAM provisions apply to acquisitions of leasehold interests in real property. These are in addition to the GSAR requirements identified in 570.101(b).

GSAM Applicable to Acquisitions of Leasehold Interests in Real Property

501	506	519.6	530
503	507	519.7	532.6
504.2	515.305–70	519.12	532.8
504.9	515.305–71	522.13	532.9
504.606	515.6	522.14	533
504.11	519.3	523.4	537.2

(d) The FAR does not apply to leasehold acquisitions of real property. Where referenced in this part, FAR provisions have been adopted based on a statutory requirement applicable to such lease acquisitions or as a matter of policy, including, but not limited to ''Federal agency procurement'' as defined at FAR 3.104.

12. Amend section 570.102 by—

a. Removing the definition ''Acquisition'';

b. Adding, in alphabetical order, the definitions ''Lease acquisition'', ''Lease extension'', and ''Lease renewal (option)'';

c. Revising the definitions ''Simplified lease acquisition threshold'', ''Small business'', and ''Solicitation for Offers (SFO)'';

d. Removing the definition ''Space in buildings'';

e. Removing from the first sentence of the definition ''Substantially as follows'' or ''substantially the same as,'' the word ''you'' and adding ''the contracting officer'' in its place; and

f. Adding, in alphabetical order, the definitions ''Succeeding lease'', ''Superseding lease'', and ''Usable square feet''.

The added and revised text reads as follows:

570.102 Definitions.

* * * * *

Lease acquisition means the acquiring by lease of an interest in improved real property for use by the Federal Government, whether the space already exists or must be constructed.

Lease extension means extension of the expiration date of a lease to provide for continued occupancy on a short term basis.

Lease renewal (option) means the right, but not the obligation of the Government to continue a lease upon specified terms and conditions, including lease term and rent.

* * * * *

Simplified lease acquisition threshold means the simplified acquisition threshold (*see* FAR 2.101), when applied to the average annual amount of rent for the term of the lease, including option periods and excluding the cost of services.

Small business means a concern including affiliates, which is organized for profit, is independently-owned and operated, is not dominant in the field of leasing commercial real estate, and that has annual average gross receipts for the preceding three fiscal years which are less than the size standard established by the Small Business Administration pursuant to 13 CFR Part 121. The size standards may be found at *http://www.sba.gov/size/sizetable2002.html.* For most lease procurements, the NAICS code is 531190.

Solicitation for Offers (SFO) means a request for negotiated proposals.

* * * * *

Succeeding lease means a lease whose effective date immediately follows the expiration date of an existing lease for space in the same building.

Superseding lease means a lease that replaces an existing lease, prior to the scheduled expiration of the existing lease term.

Usable square feet means the American National Standards Institute/Building Owners and Managers Association (ANSI/BOMA) Office Area where a tenant normally houses personnel, and/or furniture, for which a measurement is to be computed.

13. Revise section 570.103 to read as follows:

570.103 Authority to lease.

(a) The Administrator of General Services is authorized by 40 U.S.C. 585 to enter into a lease agreement for the accommodation of a Federal agency in a building (or improvement) which is in existence or being erected by the lessor for the accommodation of the Federal agency. The lease agreement may not bind the Government for more than 20 years.

(b) The contracting officer has exclusive authority to enter into and administer leases on the Government's behalf to the extent provided in his/her certificate of appointment as a contracting officer. Nothing in this subsection is intended to limit the contracting officer's authority to designate, consistent with statute and regulation, a contracting officer's representative.

570.104 [Amended]

14. Amend section 570.104 by removing ''Unless use'' and adding ''Unless the contracting officer uses'' in its place.

15. Revise section 570.105–1 to read as follows:

570.105–1 Contracting by negotiation.

Contracting by negotiation is appropriate for acquiring space in a building through a lease contract. The contracting officer will usually need to conduct discussions with offerors about their proposals and consider factors other than price in making the award.

16. Amend section 570.105–2 by—

a. Revising the section heading;

b. Revising the introductory paragraph and paragraph (a);

c. Removing from paragraph (b) ''You determine'' and adding ''The contracting officer determines whether'' in its place;

d. Removing from paragraph (b)(1) ''You expect'' and adding ''The contracting officer expects'' in its place;

e. Removing from paragraph (b)(4) ''You consider'' and adding ''The contracting officer considers'' in its place;

f. Redesignating paragraphs (b)(iv) through (b)(vi) as paragraphs (b)(v) through (b)(vii) and adding new paragraph (b)(iv); and

g. Adding paragraph (c).

The revised and added text reads as follows:

570.105–2 Criteria for the use of two-phase design-build.

The contracting officer may use the two-phase design-build selection procedures in 41 U.S.C. 253m for lease construction projects. This includes lease construction projects with options to purchase the real property leased. Use the procedures in 41 U.S.C. 253m and FAR 36.3 when the conditions in paragraphs (a) and (b) of this section are met:

(a) The contracting officer anticipates that the lease will involve the design and construction of a building, facility, or work for lease to the Government.

(b) * * *

(4) * * *

(iv) The past performance of potential contractors.

* * * * *

(c) *See* 570.305 for additional information.

570.105–3 [Removed]

17. Remove section 570.105–3.

18. Revise section 570.106 to read as follows:

570.106 Advertising, Publicizing, and Notifications to Congress.

(a) If a proposed acquisition is not exempt under FAR 5.202 or GSAR 570.106(e), and is for a leasehold interest in real property estimated to exceed 10,000 usable square feet, then the contracting officer must publicize the proposed acquisition in *FedBizOpps.gov.*

(b) For leasehold acquisitions where the solicitation requires the construction of a new building on a preselected site, the contracting officer, in accordance with the timeframes established in FAR 5.203, must publicize the proposed acquisition in *FedBizOpps.gov* regardless of size or value.

(c) Other than as identified above, the contracting officer need not publicize the proposed acquisition of a leasehold interest in real property, including expansion requests within the scope of

a lease (*see* 570.403), lease extensions under the conditions defined in 570.405, and building alterations within the scope of a lease (*see* 570.5). However, the contracting officer may publicize proposed lease acquisitions of any dollar value or square footage in *FedBizOpps.gov* or local newspapers if, in the opinion of the contracting officer, doing so is necessary to promote competition.

(d) The contracting officer may issue a consolidated advertisement for multiple, leasing actions.

(e) Except as otherwise provided in paragraph (b) above, where publicizing of the proposed acquisition is required, the notice shall be published in *FedBizOpps.gov* not less than three calendar days prior to issuance of a solicitation.

(f) Except as otherwise provided in paragraph (b) of this section and as set forth below, the contracting officer shall provide offerors not less than 20 calendar days between solicitation issuance and the date established for receipt of initial offers.

(1) For a proposed acquisition using simplified lease acquisition procedures (*see* 570.2), consider the individual acquisition and establish a reasonable response time.

(2) In cases of unusual and compelling urgency (FAR 6.303–2), provide as much time as reasonably possible under the circumstances and document the contract file.

(g) If a Member of Congress has specifically requested notification of award, the contracting officer must provide award notifications in accordance with 505.303.

19. Add section 570.106–1 to read as follows:

570.106–1 Synopsis of lease awards.

(a) Except for lease actions described in paragraph (b) of this section, contracting officers must synopsize in *FedBizOpps.gov* awards exceeding $25,000 total contract value that are likely to result in the award of any subcontracts. However, the dollar threshold is not a prohibition against publicizing an award of a smaller amount when publicizing would be advantageous to industry or to the Government.

(b) A notice is not required if—

(1) The notice would disclose the occupant agency's needs and the disclosure of such needs would compromise the national security; or

(2) The lease—

(i) Is for an amount not greater than the simplified lease acquisition threshold;

(ii) Was made through a means where access to the notice of proposed lease action was provided through *FedBizOpps.gov;* and

(iii) Permitted the public to respond to the solicitation electronically.

(c) Justifications for other than full and open competition must be posted in *FedBizOpps.gov.* Information exempt from public disclosure must be redacted.

570.107 [Amended]

20. Amend section 570.107 by removing ''You may use'' and adding ''The contracting officer may require'' in its place.

570.108 [Amended]

21. Amend section 570.108 by—

a. Removing from the third sentence in paragraph (a) ''the List of Parties Excluded from Federal Procurement and Nonprocurement Programs'' and adding ''the Excluded Parties List System (EPLS)'' in its place;

b. Removing from paragraph (b) ''Your signature'' and adding ''the contracting officer's signature'' in its place; and

c. Removing from paragraphs (c) and (d) ''you find'' and adding ''the contracting officer finds'' in its place.

570.109 [Amended]

22. Amend section 570.109 by removing ''applicable certifications'' and adding ''applicable representations and certifications'' in its place.

23. Amend section 570.110 by revising paragraph (b) to read as follows:

570.110 Cost or pricing data and information other than cost or pricing data.

* * * * *

(b) FAR 15.403–1 defines exceptions to and waivers for submitting cost or pricing data. Most leasing actions will have adequate price competition. For price analysis of offered rental rates, the contracting officer may use a market survey, an appraisal conducted using accepted real property appraisal procedures to establish a market price for comparison, or other relevant market research data. For price analysis of offered tenant improvement costs, obtain two bids or cost and pricing data.

* * * * *

24. Revise section 570.111 to read as follows:

570.111 Inspection and acceptance.

Before contracting officers accept space they must verify that the space complies with the Government's requirements and specifications and document this in an inspection report. The inspection and acceptance document must contain the usable square footage accepted and the acceptance date. Include the inspection and acceptance in the contract file.

25. Revise section 570.112 to read as follows:

570.112 Awards to Federal employees.

If contracting officers receive an offer from an officer or employee of the Government, they must follow the procedures in FAR 3.6.

26. Revise section 570.113 to read as follows:

570.113 Disclosure of mistakes after award.

If a mistake in a lessor's offer is discovered after award, the contracting officer should process it substantially in accordance with FAR 14.407–4 and GSAM 514.407.

27. Add section 570.115 to read as follows:

570.115 Novation and Change of Ownership.

In the event of a transfer of ownership of the leased premises or a change in the lessor's legal name, FAR 42.12 applies.

28. Add section 570.116 to read as follows:

570.116 Contract format.

The uniform contract format is not required for leases of real property.

29. Add section 570.117 to read as follows:

570.117 Sustainable requirements for lease acquisition.

Contracting officers must include sustainable design requirements appropriate for the type of leasing action in solicitations for offers. Solicitation requirements and instructions are listed on *http://gsa.gov/leasing* under Leasing Policies and Procedures, Green Leasing. Sustainable design requirements support improving the quality of the environment by—

(a) Controlling pollution;

(b) Managing energy and water use efficiently;

(c) Using renewable energy and renewable energy technologies;

(d) Acquiring energy-efficient and water-efficient products and services, environmentally preferable products, products containing recovered materials, and biobased products; and

(e) Requiring lessors to identify hazardous materials.

30. Amend section 570.203–2 by revising paragraph (a) and removing from paragraph (b) ''you solicit'' and adding ''the contracting officer solicits'' in its place.

570.203–2 Competition.

(a) To the maximum extent practicable, the contracting officer must solicit at least three sources to promote competition. If there are repeated

requirements for space in the same market, invite two sources, if practicable, that are not included in the most recent solicitation to submit offers.

* * * * *

31. Amend section 570.203–3 by—

a. Revising introductory paragraph (a);

b. Removing from paragraph (a)(1) ''A description of'' and adding ''Describe'' in its place;

c. Revising paragraph (a)(2);

d. Removing from paragraphs (a)(3) and (a)(4) ''A statement of'' and adding ''State'' in its place; and

e. Adding paragraph (a)(6) to read as follows:

570.203–3 Soliciting offers.

(a) The contracting officer must solicit offers by providing each prospective offeror a proposed short form lease GSA Form 3626 or SFO. The short form lease or SFO must:

* * * * *

(2) List all award factors, including price or cost, and any significant subfactors that the contracting officer will consider in awarding the lease.

* * * * *

(6) Include sustainable design requirements.

* * * * *

32. Amend section 570.203–4 by—

a. Removing from paragraph (a) ''you need'' and adding ''the contracting officer needs'' in its place;

b. Removing from paragraph (b) ''reasonable.'' and adding ''reasonable. *See* 570.110.'' in its place;

c. Revising paragraph (c);

d. Redesignating paragraphs (d) and (e) as paragraphs (e) and (f), respectively, and adding new paragraph (d); and

e. Removing from the newly designated paragraph (e) ''$500,000'' and adding ''the amount established by FAR 19.702(a)'' in its place.

The revised and added text reads as follows:

570.203–4 Negotiation, evaluation, and award.

* * * * *

(c) If the total price, including options, exceeds the amount established by FAR 15.403–4, consider whether the contracting officer needs cost and pricing data to determine that the price is fair and reasonable. In most cases, the exceptions at FAR 15.403–1 will apply.

(d) Regardless of the process used, the contracting officer must determine whether the price is fair and reasonable.

* * * * *

33. Revise the heading in subpart 570.3—to read as follows:

Subpart 570.3—Acquisition Procedures for Leasehold Interests in Real Property Over the Simplified Lease Acquisition Threshold

570.303–1 [Amended]

34. Amend section 570.303–1 by removing from the last sentence of the introductory paragraph ''provide all the following''; removing from paragraph (h) ''570.7'' and adding ''570.8'' in its place; and adding paragraph (i) to read as follows:

570.303–1 Preparing the SFO.

* * * * *

(i) Include sustainable design requirements.

35. Revise section 570.303–2 to read as follows:

570.303–2 Issuing the SFO.

Release the SFO to all prospective offerors at the same time. The SFO may be released electronically.

36. Amend section 570.303–4 by revising paragraph (d), and adding paragraph (e) to read as follows:

570.303–4 Changes to SFOs.

* * * * *

(d) If an amendment is so substantial that it requires a complete revision of the SFO, cancel the SFO, readvertise if required by 570.106, and issue a new SFO.

(e) If there are changes to the Government's requirements for amount of space, delineated area, occupancy date, and/or other major aspects of the requirements, the contracting officer shall consider whether there is a need to readvertise, and to document the file accordingly.

37. Amend section 570.304 by removing from introductory paragraph (a) ''you use either'' and adding ''the contracting officer uses one of the following''; revising paragraph (c) and introductory paragraph (d); and removing from paragraphs (d)(1) and (d)(2) ''if you'' and adding ''if the contracting officer'' in its place.

The revised text reads as follows:

570.304 General source selection procedures.

* * * * *

(c) In a best value trade off procurement, the contracting officer must include price or cost to the Government, past performance, the planned participation of small disadvantaged business concerns in performance of the contract, and other factors as required by FAR 15.304 as evaluation factors. The contracting officer may include other evaluation factors as needed.

(d) The evaluation factors and significant subfactors must comply with FAR 15.304 and either one of the following:

* * * * *

38. Amend section 570.305 by—

a. Revising paragraph (a);

b. Redesignating paragraph (c)(1)(iv) as paragraph (c)(1)(v), and adding a new paragraph (c)(1)(iv);

c. Removing from paragraph (c)(2) ''Do not'' and adding ''The contracting officer shall not'' (twice) in its place; and

d. Revising paragraph (d).

The revised text reads as follows:

570.305 Two-phase design-build selection procedures.

(a) These procedures apply to acquisitions of leasehold interests if the contracting officer uses the two-phase design-build selection procedures authorized by 570.105–2. Follow FAR 36.3.

* * * * *

(c) * * *

(1) * * *

(iv) The planned participation of small disadvantaged business concerns in performance of the contract.

* * * * *

(d) The contracting officer shall set the maximum number of offerors to be selected for phase-two to not exceed five unless the contracting officer determine that a number greater than five is both:

* * * * *

39. Amend section 570.306 by—

a. Removing from paragraph (a) ''You'' and adding ''The contracting officer'' in its place;

b. Revising paragraphs (b) and (c);

c. Redesignating paragraph (d) as paragraph (e); and adding new paragraph (d); and

d. Adding paragraph (f).

The revised and added text reads as follows:

570.306 Evaluating offers.

* * * * *

(b) Evaluate prices and document the lease file to demonstrate that the proposed contract price is fair and reasonable. The contracting officer must review the elements of the offeror's proposed rent to analyze whether the individual elements are realistic and reflect the offeror's clear understanding of the work to be performed. The contracting officer must discuss any inconsistencies with the offeror. If the offeror refuses to support or make any changes to the rent proposed, consider the risk to the Government prior to making any lease award.

(c) Evaluate past performance on previous lease projects in accordance

with 515.305 and FAR 15.305(a)(2). Obtain information through:

(1) Questionnaires tailored to the circumstances of the acquisition;

(2) Interviews with program managers or contracting officers;

(3) Other sources; or

(4) Past performance information collected under FAR 42.15 and available through the Past Performance Information Retrieval System (PPIRS) at *http://www.ppirs.gov.*

(d) The contracting officer may obtain information to evaluate an offeror's past performance on subcontracting plan goals and small disadvantaged business participation, monetary targets, and notifications under FAR 19.1202–4(b) from the following sources:

(1) The Small Business Administration;

(2) Information on prior contracts from contracting officers and administrative contracting officers;

(3) Offeror's references; and

(4) Past performance information collected under FAR 42.15 and available through PPIRS.

* * * * *

(f) Also *see* the requirements in 570.108, 570.109, and 570.111.

570.308 [Amended]

40. Amend section 570.308 by—

a. Removing from paragraph (b)(1) and the first sentence of paragraph (b)(2) ''you'' and adding ''the contracting officer'' (two times) in its place; and

b. Removing from the second sentence of paragraph (b)(2) ''You'' and adding ''The contracting officer'' in its place.

41. Revise section 570.401 to read as follows:

570.401 Renewal options.

(a) *Exercise of options.* Before exercising an option to renew, follow the procedures in 517.207. The contract must first provide the right to renew the lease. If a renewal option was not evaluated as part of the lease at award, then the addition of a renewal option during the lease term must satisfy the requirements of GSAM 506 regarding full and open competition.

(b) *Market information review.* Before exercising an option to renew a lease, review current market information to determine that the rental rate in the option is fair and reasonable.

570.402–1 [Amended]

42. Amend section 570.402–1 by—

a. Removing from paragraphs (a) and (b) ''you'' and adding ''the contracting officer'' (twice) in its place;

b. Removing from paragraph (b)(1) ''You do'' and adding ''The contracting officer does'' in its place; and

c. Removing from paragraph (b)(2) ''You identify'' and adding ''The contracting officer identifies'' in its place.

43. Amend section 570.402–2 by—

a. Revising the introductory paragraph;

b. Removing from paragraph (a) ''the'' and adding ''that the'' in its place;

c. Removing from paragraph (b) ''requirement'' and adding ''requirements'' in its place; and

d. Revising paragraphs (c) and (d).

The revised text reads as follows:

570.402–2 Publicizing/Advertising.

The contracting officer must publish a notice if required by 570.106. The notice should:

* * * * *

(c) Indicate that the Government is interested in considering alternative space if economically advantageous, or otherwise the Government intends to pursue a sole source acquisition.

(d) Advise prospective offerors that the Government will consider relocation costs (such as moving, alterations, and telecommunications) when deciding whether it should relocate or pursue a sole source acquisition.

* * * * *

44. Amend section 570.402–4 by revising the first sentence to read as follows:

570.402–4 No potential acceptable locations.

If the contracting officer does not identify any potential acceptable locations through the advertisement or the market survey, s/he may prepare a justification to negotiate directly with the present lessor. * * *

45. Amend section 570.402–5 by—

a. Removing from the introductory paragraph ''you identify'' and adding ''the contracting officer identifies'' in its place;

b. Revising paragraph (a); and

c. Removing from paragraph (b)(1) ''you'' and adding ''the contracting officer'' in its place.

The revised text reads as follows:

570.402–5 Potential acceptable locations.

* * * * *

(a) If the cost-benefit analysis indicates that the Government will recover relocation costs and duplication of costs through competition, develop an SFO and negotiate with all interested parties following 570.3. Disclose in the SFO Price Evaluation paragraph the Government's estimate of relocation costs that will be used in the price evaluation. Relocation costs should include, but are not limited to, costs to duplicate tenant improvements, furniture and equipment move, breakdown and setup of systems furniture and other equipment, telecommunications costs, and administrative time.

* * * * *

46. Revise section 570.402–6 to read as follows:

570.402–6 Cost-benefit analysis.

The contracting officer must compare the costs and prices for a lease at potentially suitable properties to the costs and prices for a succeeding lease at the current location. The analysis must summarize the total present value of the costs and prices for the firm term of the lease and incorporate the elements in paragraphs (a) through (d) of this section:

(a) *Lease prices.* Establish the lease prices by requesting an informational quotation from each prospective offeror and the present lessor. Provide a general description of the Government's needs without a formal SFO.

(1) Adjust the prices quoted to reflect GSA's standard space at the potentially suitable properties to cover any special requirements.

(2) Document quotations with the following information:

(i) Name and address of the firm solicited.

(ii) Name of the firm's representative providing the quote.

(iii) Price(s) quoted.

(iv) Description of the space and services for which the quote is provided.

(v) Name of the Government employee soliciting the quotation.

(vi) Date quote was received.

(b) *Full costs to duplicate tenant improvements.* (1) Estimate the full cost to duplicate alterations at potentially suitable properties. Estimate the cost of new tenant improvements, if required, at the current location.

(2) Estimate the cost of lump sum tenant improvement at potentially suitable properties. Estimate the cost of new lump sum tenant improvements, if required, at the current location.

(c) *Relocation costs.* Estimate the relocation costs to potentially suitable properties, including, but not limited to, the costs associated with furniture and equipment move, breakdown and setup of systems furniture and other equipment, telecommunications costs, and administrative time.

(d) Other appropriate considerations.

(e) *Summary of firm term costs and prices.* Total the costs and prices for the elements in paragraphs (a) through (d) of this section, compare the potentially suitable properties to a succeeding lease, and conclude whether the

Government will recover relocation costs and duplication of costs through competition.

47. Amend section 570.403 by—

a. Removing from paragraph (a) ''you'' and adding ''the contracting officer'' in its place;

b. Revising paragraph (b)(2); and

c. Removing from paragraph (c) ''you determine'' and adding ''the contracting officer determines'' in its place.

The revised text reads as follows:

570.403 Expansion requests.

* * * * *

(b) * * *

(2) If the contracting officers identify other potentially suitable properties for the total requirement, they must perform a cost-benefit analysis to determine whether it is in the Government's best interest to relocate.

(i) Follow the procedure in 570.402–6. (ii) Add the total present value cost of the unexpired portion of the firm term of the current lease.

* * * * *

48. Amend section 570.404 by—

a. Removing from paragraph (a) ''present lease.'' and adding ''or when market conditions warrant renegotiation of an existing lease.'' in its place;

b. Redesignating paragraph (b) as paragraph (d), and adding new paragraphs (b) and (c), respectively;

c. Removing from the newly designated paragraph (d) ''you'' and adding ''the contracting officer'' in its place; and

d. Adding paragraph (e).

The added text reads as follows:

570.404 Superseding leases.

* * * * *

(b) If contracting officers plan to renegotiate a lease and the superseding lease will exceed the simplified lease acquisition threshold, they may do so under either one of the following conditions:

(1) The Government does not identify any potential acceptable locations.

(2) The Government identifies potential acceptable locations, but a cost-benefit analysis as described in 570.402–6 indicates that award to an offeror other than the present lessor will result in substantial relocation costs or duplication of costs to the Government, and the Government cannot expect to recover such costs through competition.

(c) If contracting officers plan to renegotiate a lease they should publish a notice if required by 570.106. The notice should:

(1) Indicate that the Government is considering renegotiating an existing lease.

(2) Describe the requirement in terms of type and quantity of space.

(3) Indicate that the Government is interested in considering alternative space if economically advantageous, or that otherwise the Government intends to pursue a sole source acquisition.

(4) Advise prospective offerors that the Government will consider relocation costs (which may include but are not limited to costs to duplicate tenant improvements, move furniture and equipment, breakdown and setup systems furniture and other equipment, telecommunications, and administrative time) and the cost of terminating its existing lease when deciding whether it should relocate or pursue a sole source lease.

(5) Provide a contact person for those interested in providing space to the Government.

* * * * *

(e) If the contracting officer identifies other potentially suitable properties, s/he must perform a cost-benefit analysis to determine whether it is in the Government's best interest to relocate.

(1) Follow the procedure in 570.402–6.

(2) Add the total present value cost of the unexpired portion of the firm term of the current lease.

49. Amend section 570.405 by removing from paragraph (b) ''you'' and adding ''the contracting officer'' in its place; revising introductory paragraph (c) and paragraph (c)(3); and adding paragraph (c)(4).

The revised text reads as follows:

570.405 Lease extensions.

* * * * *

(c) FAR 6.302–1 permits contracting without providing for full and open competition when the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency. This authority may apply to lease extensions in situations such as, but not limited to, the following:

* * * * *

(3) The Government is consolidating various agencies and the contracting officer needs to extend the terms of some leases to establish a common expiration date.

(4) The agency occupying the space has encountered delays in planning for a potential relocation to other Federally controlled space due to documented organizational, financial, or other uncertainties.

50. Amend section 570.501 by revising introductory paragraph (a) and paragraph (a)(1); removing from introductory paragraph (b) ''general''; and removing from paragraph (b)(1) ''justified'' and adding ''as justified'' in its place.

The revised text reads as follows:

570.501 General.

(a) The procedures in 570.502 apply to alterations acquired directly from a lessor by modification or supplemental lease agreement. This is allowed if the following conditions are met:

(1) The alterations fall within the scope of the lease. Consider whether the work can be regarded as fairly and reasonably as part of the original lease requirement.

* * * * *

51. Revise section 570.502 to read as follows:

570.502 Alterations by the lessor.

52. Amend section 570.502–1 by removing from the introductory paragraph ''you plan'' and adding ''the contracting officer plans'' in its place; and revising paragraphs (a), (b), and (c) to read as follows:

570.502–1 Justification and approval requirements.

* * * * *

(a) If the alteration project will not exceed the micro-purchase threshold identified in FAR 2.101(b), no justification and approval is required.

(b) If the alteration project will exceed the micro-purchase threshold identified in FAR 2.101(b), but not the simplified lease acquisition threshold, the contracting officer may use simplified acquisition procedures and explain the absence of competition in the file.

(c) If the alteration project will exceed the simplified lease acquisition threshold, the justification and approval requirements in FAR 6.3 and 506.3 apply.

53. Amend section 570.502–2 by—

a. Removing from paragraph (a) ''Prepare'' and adding ''The contracting officer must prepare'' in its place;

b. Removing from paragraph (b) ''Obtain'' and adding ''The contracting officer must obtain'' in its place;

c. Removing from paragraph (c)(1) ''Provide'' and adding ''The contracting officer must provide'' in its place;

d. Removing from paragraph (c)(2) ''Request'' and adding ''The contracting officer must request'' in its place;

e. Revising paragraph (d);

f. Revising introductory paragraph (e) and paragraph (e)(2), and removing from paragraph (e)(4) ''your analysis'' and adding ''the analysis'' in its place;

g. Revising introductory paragraph (f), removing from paragraph (f)(1) ''You may make reasonable'' and adding ''Make reasonable'' in its place, and removing from paragraph (f)(2) ''The

negotiated price should provide the'' and adding ''Provide the'' in its place;

h. Revising paragraph (g); and

i. Removing from introductory paragraph (h) ''Do not'' and adding ''The contracting officer must not'' in its place.

570.502–2 Procedures.

* * * * *

(d) *Audits.* If the contracting officer requires cost or pricing data and the alteration project will exceed the threshold identified in FAR 15.403–4, request an audit.

(e) *Proposal evaluation.* The contracting officer must—

* * * * *

(2) Analyze price or cost information. At a minimum, compare the proposed cost to the independent estimate and, if applicable, any audit results received.

* * * * *

(f) *Price negotiations.* The contracting officer must—

* * * * *

(g) *Order.* For modifications not exceeding the simplified acquisition threshold, lease contracting officers may delegate alteration contracting authority to a warranted contracting officer's representative in GSAR or the tenant agency. Alterations awards must reference the lease number.

* * * * *

54. Amend section 570.503 by revising paragraph (a)(2), and removing paragraph (b).

The revised text reads as follows:

570.503 Alterations by the Government or through a separate contract.

(a) * * *

(2) Contract out the work using standard contracting procedures that apply to a construction contract performed on Federal property. If the Government decides to contract for the work, invite the lessor, as well as all other prospective contractors, to submit offers for the project.

55. Redesignating subpart 570.6 (consisting of sections 570.601 through 570.604) and subpart 570.7 (consisting of 570.701 and 570.702) as subpart 570.7 and subpart 570.8, respectively; and adding new subpart 570.6.

The added text reads as follows:

Subpart 570.6—Contracting for Overtime Services and Utilities in Leases

Sec.

570.601 General.

Subpart 570.6—Contracting for Overtime Services and Utilities in Leases

570.601 General.

(a) Lease tenant agencies may need overtime services and utilities on a regular or intermittent basis. Lease contracting officers may negotiate overtime rates for services and utilities and include those rates in leases where a need is projected. Only lease contracting officers may negotiate overtime rates.

(b) An independent government estimate is required in support of the negotiated rate.

(c) *Order.* To order overtime services and utilities, if the order does not exceed the simplified acquisition threshold, a warranted contracting officer's representative, in GSA or the tenant agency, may place an order. The order must reference the lease number.

(d) *Payment.* Do not make final payment for services and utilities until confirmed as delivered in a satisfactory manner.

56. Amend the newly designated section 570.701 by revising paragraphs (a) through (j); and adding paragraph (l) to read as follows:

570.701 FAR provisions and clauses.

Include provisions or clauses substantially the same as the FAR provisions and clauses listed below:

If—	Then include—
(a) The estimated value of the acquisition exceeds the micro-purchase threshold identified in FAR 2.101.	52.204–3 Taxpayer Identification. 52.204–6 Data Universal Numbering System (DUNS) Number. 52.204–7 Central Contractor Registration. 52.219–1 Small Business Program Representations. 52–219–28 Post-Award Small Business Program Rerepresentation (use if lease term exceeds five years). 52.222 52.232–23 Assignment of Claims. 52.232–33 Electronic Funds Transfer—Central Contractor Registration. 52.233–1 Disputes.
(b) The estimated value of the acquisition exceeds $10,000	52.222–21 Prohibition of Segregated Facilities. 52.222–22 Previous Contracts and Compliance Reports. 52.222–25 Affirmative Action Compliance. 52.222–26 Equal Opportunity. 52.222–35 Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era. 52.222–36 Affirmative Action for Workers with Disabilities 52.222–37 Employment Reports on Disabled Veterans and Veterans of the Vietnam Era.
(c) The estimated value of the acquisition exceeds the threshold identified in FAR 9.409(b).	52.209–6 Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment.
(d) The estimated value of the acquisition exceeds $100,000	52.203–11 Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.
(e) The estimated value of the acquisition exceeds the simplified lease acquisition threshold.	52.203–2 Certificate of Independent Price Determination. 52.203–7 Anti-Kickback Procedures. 52.204–5 Women-Owned Business (Other than Small Business). 52.209–5 Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters. 52.215–2 Audit and Records—Negotiation. 52.219–8 Utilization of Small Business Concerns. 52.222–54 Employment Eligibility Verification. 52.223–6 Drug-Free Workplace. 52.233–2 Service of Protest.

If—	Then include—
(f) The estimated value of the acquisition exceeds the threshold identified in FAR 19.708(b).	52.219–9 Small Business Subcontracting Plan
(g) The estimated value of the acquisition exceeds the threshold identified in FAR 19.1202–2(a) and the contracting officer is using a best value trade off analysis in an acquisition includes an evaluation factor that considers the extent of participation of small disadvantaged business concerns in accordance with FAR 19.12.	52.219–16 Liquidated Damages—Subcontracting Plan. 52.219–24 Small Disadvantaged Business Participation Program—Targets. 52.219–25 Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting.
(h) The value of the contract is expected to exceed $5 million and the performance period is 120 days or more.	52.203–13 Contractor Code of Business Ethics and Conduct.
(i) The estimated value of the acquisition exceeds $10 million	52.203–14 Display of Hotline Poster(s).
(j) The contracting officer requires cost or pricing data for work or services exceeding the threshold identified in FAR 15.403–4.	52.222–24 Pre-award On-site Equal Opportunity Compliance Review. 52.215–10 Price Reduction for Defective Cost or Pricing Data. 52.215–12 Subcontractor Cost.
(k) The contracting officer authorizes submission of facsimile proposals	52.215–10 Price Reduction for Defective Cost or Pricing Data. 52.215–5 Facsimile Proposals.
(l) A negotiated acquisition provides monetary incentives based on actual achievement of small disadvantaged business subcontracting targets under FAR 19.1203 and 519.1203.	52.219–26 Small Disadvantaged Business Participation Program—Incentive Subcontracting.

57. Revise the undesignated introductory paragraph of the newly designated section 570.702 to read as follows:

570.702 GSAR solicitation provisions.

Each SFO must include provisions substantially the same as the following, unless the contracting officer determines that the provision is not appropriate. However, document the file with the basis for deleting or substantially changing a clause.

* * * * *

58. Amend the newly designated section 570.703 by designating the introductory paragraph as introductory paragraph (a) and revising the newly designated introductory paragraph (a); adding new entry 552.215–70 under introductory paragraph (a), in numerical order; and adding new paragraph (b) to read as follows:

570.703 GSAR contract clauses.

(a) Insert clauses substantially the same as the following in solicitations and contracts for leasehold interests in real property that exceed the simplified lease acquisition threshold, unless the contracting officer determines that a clause is not appropriate. However, document the file with the basis for deleting or substantially changing a clause. A deviation is not required under 570.704 to determine that a clause in this section is not appropriate. Use the clauses at your discretion in actions at or below the simplified lease acquisition threshold.

552.215–70 Examination of Records by GSA

* * * * *

(b) Include the following provisions and clauses in leasehold interests in real property.

552.270–30 Price Adjustment for Illegal Improper Activity

552.270–31 Prompt Payment

552.270–32 Covenant Against Contingent Fees

59. Amend section 570.704 by removing from paragraph (a) ''You need'' and adding ''The contracting officer needs'' in its place; revising paragraph (b); and removing from paragraph (c) ''you can'' and adding ''the contracting officer can'' in its place. The revised text reads as follows:

570.704 Deviations to provisions and clauses.

* * * * *

(b) The contracting officer also needs an approved deviation to modify the language of a provision or clause mandated by statute (*e.g.*, FAR 52.215–2, Audit and Records—Negotiation). The authorizing statute must allow for a waiver.

* * * * *

60. Revise the newly designated section 570.801 to read as follows:

570.801 Standard forms.

Use Standard Form 2, U.S. Government Lease for Real Property, to award leases unless the contracting officer uses GSA Form 3626 (*see* 570.802).

61. Amend the newly designated section 570.802 by revising paragraph (a); removing from paragraphs (b) and (c) ''You may'' and adding ''The contracting officer may'' in its place; and adding paragraph (d).

The revised and added text reads as follows:

570.802 GSA forms.

(a) The contracting officer may use GSA Form 3626, U.S. Government Lease for Real Property (Short Form), to award leases if using the simplified leasing procedures in 570.2 or if they determine it advantageous to use the form.

* * * * *

(d) The contracting officer may use GSA Form 1217, Lessor's Annual Cost Statement, to obtain pricing information regarding offered services and lease commissions.

[FR Doc. E9–28246 Filed 12–3–09; 8:45 am]

BILLING CODE 6820–61–P

Notices

Federal Register
Vol. 74, No. 232
Friday, December 4, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request, Correction

December 1, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Application for Return of Exported Product.

OMB Control Number: 0583–0138.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*). These statutes mandate that FSIS protect the public by ensuring that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged. In accordance with 9 CFR 327.17, 381.209, and 590.965, exported products returned to this country are exempt from FSIS import inspection requirements upon notification to and approval from the Agency's Office of International Affairs (OIA). Returned product may, however, require re-inspection at a federally inspected facility for food safety and food defense determinations.

Need and Use of the Information: FSIS will collect information using FSIS form 9010–1, ''Application for the Return of Exported Products to the United States.'' The form allows OIA to decide whether re-inspection of the returned product is needed and to notify the appropriate FSIS office where to perform the re-inspection of the product, if necessary.

Description of Respondents: Business or other for-profit.

Number of Respondents: 500.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 2,500.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–28962 Filed 12–3–09; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 1, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Farm Service Agency

Title: Biomass Crop Assistance Program (BCAP).

OMB Control Number: 0560–0263.

Summary of Collection: The Farm Service Agency (FSA) in Conservation and Environment Programs Division has

been tasked with implementing the Biomass Crop Assistance Program (BCAP) authorized by section 9001 of the 2008 Farm Bill (Pub. L. 220–246), which amends Title IX of the Farm Security and Rural Investment Act of 2002 and adds section 9011 for BCAP. On May 5, 2009, the President issued a Presidential Directive to the Secretary of Agriculture to aggressively accelerate the investment in and production of biofuels. The Presidential Directive requests that the Secretary of Agriculture take steps to the extent permitted by law to expedite and increase production of and investment in biofuel development efforts by making renewable energy financing opportunities and including guidance and support for the collection, harvest, storage, and transportation (CHST) assistance of eligible materials for use in biomass conversion facilities.

Need and Use of the Information: Information collected will be collected using forms AD–245 and AD–247. The collected information from eligible biomass owners and biomass conversion facilities meeting the requirements for CHST qualification is necessary in order to ensure the financial accountability needed to operate and administer the BCAP. The information will be used to produce reports, as needed by FSA to inform the public how FSA has administered CHST funds at the State and country levels and to establish a list of CHST qualified biomass conversion facilities.

Description of Respondents: Farm; Business or other for-profit.

Number of Respondents: 5,600.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 38,700.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–28964 Filed 12–3–09; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Barron & Brothers International of Cornelia, Georgia, an exclusive license to U.S. Patent Application Serial No. 12/494,490, ''System For Delivering Poultry Litter Below Soil Surface'', filed on June 30, 2009.

DATES: Comments must be received on or before January 4, 2010.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Barron & Brothers International of Cornelia, Georgia, has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. E9–28961 Filed 12–3–09; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Current Population Survey (CPS) Fertility Supplement

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before February 2, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Karen Woods, U.S. Census Bureau, 7H110F, Washington, DC 20233–8400 at (301) 763–3806.

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Census Bureau is requesting clearance for the collection of data concerning the Fertility Supplement to be conducted in conjunction with the June 2010 CPS. The Census Bureau sponsors the supplement questions, which were previously collected in June 2008, and have been asked periodically since 1971.

This survey provides information used mainly by government and private analysts to project future population growth, to analyze child spacing, and to aid policymakers in their decisions affected by changes in family size and composition. Past studies have discovered noticeable changes in the patterns of fertility rates and the timing of the first birth. Potential needs for government assistance, such as aid to families with dependent children, child care, and maternal health care for single parent households, can be estimated using CPS characteristics matched with fertility data.

II. Method of Collection

The fertility information will be collected by both personal visit and telephone interviews in conjunction with the regular June CPS interviewing. All interviews are conducted using computer-assisted interviewing.

III. Data

OMB Number: 0607–0610.

Form Number: There are no forms. We conduct all interviewing on computers.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 30,000.

Estimated Time per Response: 30 seconds.

Estimated Total Annual Burden Hours: 250.

Estimated Total Annual Cost: There are no costs to the respondents other than their time to answer the CPS questions.

Respondents' Obligation: Voluntary.

Legal Authority: Title 13, U.S.C., Section 182; and Title 29, U.S.C., Sections 1–9.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for the Office of Management and Budget approval of this information collection; they also will become a matter of public record.

Dated: December 1, 2009.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E9–28948 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–824]

Polyethylene Terephthalate Film Sheet and Strip From India: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 4, 2009.

FOR FURTHER INFORMATION CONTACT: Martha Douthit, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5050.

Background

On July 1, 2009, the Department of Commerce (the Department), published in the **Federal Register** a notice of ''Opportunity to Request an Administrative Review'' of the antidumping duty order on polyethylene terephthalate film sheet and strip (PET Film) from India. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 74 FR 31406 (July 1, 2009). On July 31, 2009, Jindal Poly Films Limited (Jindal), an Indian producer and exporter of PET Film to the United States, timely requested that the Department conduct an administrative review of Jindal. Jindal was the only party to request this administrative review.

On August 25, 2009, the Department published a notice of initiation of the antidumping duty administrative review of PET Film from India for the period of review, July 1, 2008 through June 30, 2009. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 42873 (August 25, 2009). Jindal withdrew its request for an administrative review on September 18, 2009.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. Jindal withdrew its request before the 90-day deadline and no other party requested an administrative review of the antidumping duty order on PET Film from India. Therefore, in response to Jindal's withdrawal of its request for an administrative review pursuant to 19 CFR 351.213(d)(1), the Department hereby rescinds the administrative review of the antidumping duty order on PET Film from India.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. For the company for which this review is rescinded, the antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212 (c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this rescission of administrative review in the **Federal Register.**

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f) (2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protection orders (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: November 30, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–29015 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–886]

Polyethylene Retail Carrier Bags From the People's Republic of China: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 29, 2009, the Department of Commerce published the preliminary results of the 2007/2008 administrative review of the antidumping duty order on polyethylene retail carrier bags from the People's Republic of China. The review covers one exporter. The period of review is August 1, 2007, through July 31, 2008. We invited interested parties to comment on these preliminary results.

Based on our analysis of the comments received, we have made changes to our margin calculations. Therefore, the final results differ from the preliminary results. The final weighted–average dumping margins for

the reviewed firm is listed below in the section entitled ''Final Results of the Review.''

EFFECTIVE DATE: December 4, 2009.

FOR FURTHER INFORMATION CONTACT: Catherine Cartsos or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1757 or (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 29, 2009, the Department of Commerce (the Department) published the preliminary results of review of the antidumping duty order on polyethylene retail carrier bags (PRCBs) from the People's Republic of China (PRC). See *Polyethylene Retail Carrier Bags from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 37694 (July 29, 2009) (*Preliminary Results*). The administrative review covers Zongshan Rally Plastics Co., Ltd., and Rally Plastics Co., Ltd. (collectively Rally).

We invited parties to comment on the *Preliminary Results*. On August 31, 2009, we received case briefs from the Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation (collectively, the petitioners), and Rally. On September 3, 2009, we received a rebuttal brief from Rally. Although Rally requested on August 28, 2009, that the Department hold a hearing, it withdrew its request for a hearing on September 4, 2009; therefore, we did not conduct a hearing.

We have conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise subject to the antidumping duty order is PRCBs, which may be referred to as t–shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non–sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches but not longer than 40 inches (101.6 cm).

PRCBs are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.*, grocery, drug, convenience, department, specialty retail, discount stores, and restaurants, to their customers to package and carry their purchased products. The scope of the order excludes (1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end–uses other than packaging and carrying merchandise from retail establishments, *e.g.*, garbage bags, lawn bags, trash–can liners.

Imports of the subject merchandise are currently classifiable under statistical category 3923.21.0085 of the Harmonized Tariff Schedule of the United States (HTSUS).[1] This subheading may also cover products that are outside the scope of the order. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Separate Rates

In proceedings involving non–market-economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

In the *Preliminary Results*, we treated the PRC as an NME country and found that Rally demonstrated its eligibility for separate–rate status. We received no comments from interested parties regarding the separate–rate status of Rally. Therefore, for these final results of review, we continue to find that the evidence placed on the record of this review by Rally demonstrates an absence of government control, both in law and in fact, with respect to its exports of the subject merchandise. Thus, we have determined that Rally is eligible to receive a separate rate.

Surrogate Country

In the *Preliminary Results*, we treated the PRC as an NME country and, therefore, we calculated normal value in accordance with section 773(c) of the Act. Also, we stated that we selected India as the appropriate surrogate country to use in this review because it is a significant producer of merchandise comparable to subject merchandise and it is at a level of economic development comparable to the PRC, pursuant to section 773(c)(4) of the Act. See *Preliminary Results*, 74 FR at 37694. No interested party commented on our designation of the PRC as an NME country nor the selection of India as the surrogate country. Therefore, we have continued to treat the PRC as an NME country and have used the same surrogate country, India, for these final results of review.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this review are addressed in the Issues and Decision Memorandum from John M. Andersen, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, dated concurrently with this notice (Decision Memo), which is hereby adopted by this notice. The issue which parties have raised and to which we have responded in the Decision Memo relates to the valuation of NME purchases of a factor of production, calcium carbonate. Parties can find a complete discussion of the issue raised in this review and the corresponding recommendation in this public memorandum, which is on file in the Central Records Unit, main Department of Commerce building, Room 1117, and is accessible on the Web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the Decision Memo are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made several changes in our margin calculations. Specifically, we have changed our selection of the surrogate value for the valuation of calcium carbonate. See Decision Memo and Analysis Memorandum dated concurrently with this notice. Additionally, we have corrected undisputed clerical errors in our calculations. See Analysis Memorandum.

[1] Until July 1, 2005, these products were classifiable under HTSUS 3923.21.0090 (Sacks and bags of polymers of ethylene, other). See Harmonized Tariff Schedule of the United States (2005) – Supplement 1 Annotated for Statistical Reporting Purposes Change Record – 17th Edition – Supplement 1, available at http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0510/0510chgs.pdf.

Final Results of the Review

As a result of our review, we determine that a final weighted–average dumping margin of 17.92 percent exists for Rally for the period August 1, 2007, through July 31, 2008.

Assessment Rates

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results of administrative review. In calculating importer–specific assessment rates, we divided the total dumping margins (calculated as the difference between normal value and export price) for each of Rally's importers or customers by the total number of units the exporter sold to that importer or customer. We will direct CBP to assess the resulting per–unit dollar amount against each unit of merchandise in each of that importer's/customer's entries during the review period.

Cash–Deposit Requirements

The following cash–deposit requirements will be effective upon publication of this notice of final results of administrative review for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the publication as provided by section 751(a)(1) of the Act: (1) for subject merchandise exported by Rally, the cash deposit rate will be 17.92 percent; (2) for previously reviewed or investigated companies not listed above that have separate rates, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; (3) for all other PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash–deposit rate will be the PRC–wide rate of 77.57 percent; (4) for all non–PRC exporters of subject merchandise the cash–deposit rate will be the rate applicable to the PRC exporter that supplied that exporter. These deposit requirements shall remain in effect until further notice.

Notifications

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties. See *id*.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213.

Dated: November 25, 2009.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E9–29018 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–822]

Polyethylene Retail Carrier Bags From Indonesia: Amended Preliminary Determination of Sales at Less Than Fair Value

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On November 3, 2009, the Department of Commerce published the preliminary determination of sales at less than fair value in the antidumping duty investigation of polyethylene retail carrier bags from Indonesia. *See Polyethylene Retail Carrier Bags from Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 FR 56807 (November 3, 2009) (*Preliminary Determination*). We are amending our *Preliminary Determination* to correct certain ministerial errors with respect to the antidumping duty margin calculation for P.T. Super Exim Sari Ltd. (SES) and P.T. Super Makmur (SM) (collectively SESSM). The corrections to the margin for SESSM also affect the calculation of the all–others rate.

EFFECTIVE DATE: November 3, 2009.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–5760 or (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 27, 2009, the Department issued a preliminary determination that polyethylene retail carrier bags from Indonesia are being, or are likely to be, sold in the United States at less than fair value as provided in section 733 of the Tariff Act of 1930, as amended (the Act). See *Preliminary Determination*. On November 2, 2009, SESSM filed timely allegations of ministerial errors contained in the *Preliminary Determination*. After reviewing the allegations, we have determined that the *Preliminary Determination* included significant ministerial errors. Therefore, in accordance with 19 CFR 351.224(e), we have made changes to the *Preliminary Determination* as described below.

Period of Investigation

The period of investigation is January 1, 2008, through December 31, 2008.

Scope of the Investigation

The merchandise subject to this investigation is polyethylene retail carrier bags, which also may be referred to as t–shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non–sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches (15.24 cm) but not longer than 40 inches (101.6 cm).

Polyethylene retail carrier bags are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.*, grocery, drug, convenience, department, specialty retail, discount stores, and restaurants to their customers to package and carry their purchased products. The scope of this investigation excludes (1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end–uses other than packaging and carrying merchandise from retail establishments, *e.g.*, garbage bags, lawn bags, trash–can liners.

Imports of merchandise included within the scope of this investigation are currently classifiable under statistical category 3923.21.0085 of the Harmonized Tariff Schedule of the United States (HTSUS). This subheading may also cover products that are outside the scope of this investigation. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Significant Ministerial Error

Ministerial errors are defined in section 735(e) of the Act as ''errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.'' Section 351.224(e) of the Department's regulations provides that the Department ''will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination.'' A significant ministerial error is defined as a ministerial error, the correction of which, singly or in combination with other errors, would result in (1) a change of at least five absolute percentage points in, but not less than 25 percent of, the weighted–average dumping margin calculated in the original (erroneous) preliminary determination, or (2) a difference between a weighted–average dumping margin of zero or *de minimis* and a weighted–average dumping margin of greater than *de minimis* or *vice versa*. See 19 CFR 351.224(g).

Ministerial–Error Allegations

SESSM argues that the Department treated SESSM as a single entity throughout the *Preliminary Determination* but the Department calculated the antidumping duty margin for SESSM erroneously in the *Preliminary Determination* by treating SES and SM as two separate entities. Despite the Department's stated intent to treat SES and SM as a single entity, SESSM claims, the Department's calculation programs used two different manufacturer codes SESSM reported (SES and SM) in its sales databases to match U.S. and home–market sales transactions. As a result, SESSM states, the Department matched SES's U.S. sales with SES's home–market sales but not with SM's home–market sales and did not compare SM's U.S. sales to comparable sales of merchandise produced by SES and sold in the home market.

SESSM asserts that, as a result of the oversight, the Department also used the manufacturer code to segregate SES's sales and cost data from SM's sales and cost data for cost–test purposes. SESSM suggests that the Department revise the calculation programs to use one unified manufacturer code for model–matching and cost–test purposes. SESSM asserts that its suggested programming language is consistent with other investigations and reviews in which the Department has had to consider U.S., home–market, or third–country sales by multiple affiliated companies within a single entity.

SESSM claims that these ministerial errors in the calculation of an antidumping duty margin in the *Preliminary Determination* for SESSM are significant because the correction of these errors would result in a cumulative change of at least five percentage points but not less than 25 percent of the original weighted–average dumping margin or would result in a *de minimis* weighted–average dumping margin in accordance with 19 CFR 351.224(g).

We agree with SESSM that we intended to treat SES and SM as a single entity. See, *e.g.*, *Preliminary Determination* in which we treated SES and SM as a single entity and calculated a single margin for SESSM. We inadvertently treated SES and SM as separate entities for purposes of matching U.S. and home–market sales and conducting the cost test. We find that this is a ministerial error in accordance with section 735(e) of the Act. Further, correction of the errors confirms that they were significant errors under 19 CFR 351.224(g).

Amended Preliminary Determination

We determine that SESSM's allegations qualify as significant ministerial errors as defined in 19 CFR 351.224(g) because they result in a change of more than five absolute percentage points to the antidumping duty margin for SESSM and is not less than 25 percent of the original weighted–average dumping margin. Accordingly, we have corrected these errors SESSM alleged. To correct these errors, we have used an identical manufacturer code for purposes of matching U.S. and home–market sales and conducting the cost test for this amended preliminary determination. See more details in the SESSM amended preliminary determination analysis memorandum dated concurrently with the issuance of this amended preliminary determination. As a result of correcting these significant ministerial errors in the *Preliminary Determination* for SESSM, the simple–average all–others rate has also changed. As a result of the corrected ministerial errors, the weighted–average antidumping duty margin for SESSM is 9.10 percent and the simple–average all–others rate is 38.14 percent.

The collection of bonds or cash deposits and suspension of liquidation will be revised accordingly and parties will be notified of this determination in accordance with sections 733(d) and (f) of the Act. The effective date of the implementation of collection of bonds or cash deposits and suspension of liquidation as revised in this amended preliminary determination will be the effective date of the *Preliminary Determination*. We will issue instructions to U.S. Customs and Border Protection (CBP) authorizing it to refund the antidumping duty deposits SESSM made in excess of the amended antidumping duty margin for SESSM since the effective date of the *Preliminary Determination*. We will also issue instructions to CBP authorizing it to refund the antidumping duty deposits companies subject to the all–others rate made in excess of the amended all–others rate since the effective date of the *Preliminary Determination*.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the International Trade Commission (ITC) of our amended preliminary determination. If our final determination is affirmative, the ITC will make its final determination no later than 45 days after our final determination as to whether imports of polyethylene retail carrier bags from Indonesia are materially injuring, or threatening material injury to, the U.S. industry. See section 735(b)(2) of the Act.

This amended determination is issued and published pursuant to sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.224(e).

Dated: November 25, 2009.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E9–29017 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–963]

Certain Potassium Phosphate Salts From the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Andrew Huston or Mark Hoadley, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4261 and (202) 482–3148, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 14, 2009, the Department of Commerce (the Department) initiated the countervailing duty investigation of certain sodium and potassium phosphate salts from the People's Republic of China. *See Certain Sodium and Potassium Phosphate Salts From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 74 FR 54778 (October 23, 2009). Currently, the preliminary determination is due no later than December 18, 2009.

Postponement of Due Date for the Preliminary Determination

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires the Department to issue the preliminary determination in a countervailing duty investigation within 65 days after the date on which the Department initiated the investigation. However, the Department may postpone making the preliminary determination until no later than 130 days after the date on which the administering authority initiated the investigation if, among other reasons, the petitioner makes a timely request for an extension pursuant to section 703(c)(1)(A) of the Act. In the instant investigation, the petitioners, ICL Performance Products LP and Prayon, Inc., made a timely request on November 20, 2009, requesting that the Department postpone the preliminary countervailing duty determination. *See* 19 CFR 351.205(e) and the petitioners' November 20, 2009, letter requesting postponement of the preliminary determination.

Therefore, pursuant to the discretion afforded the Department under 703(c)(1)(A) of the Act and because the Department does not find any compelling reason to deny the request, we are extending the due date for the preliminary determination to no later than 130 days after the date on which this investigation was initiated (*i.e.*, to February 21, 2010). However, February 21, 2010 falls on a Sunday, and it is the Department's long–standing practice to issue a determination the next business day when the statutory deadline falls on a weekend, federal holiday, or any other day when the Department is closed. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended*, 70 FR 24533 (May 10, 2005). Accordingly, the deadline for the completion of the preliminary determination is now February 22, 2010, the first business day after the 130th day from initiation.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(l).

Dated: November 25, 2009.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E9–29003 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–917]

Laminated Woven Sacks From the People's Republic of China: Partial Rescission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is rescinding in part the administrative review of the countervailing duty order on laminated woven sacks (''LWS'') from the People's Republic of China (''PRC'') for the period December 3, 2007 to December 31, 2008, with respect to Changshu Xinsheng Bags Producing Company Ltd. (''Changshu''). This partial rescission is based on Changshu's withdrawal of its review.

DATES: *Effective Date:* December 4, 2009.

FOR FURTHER INFORMATION CONTACT: Martha Douthit, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5050.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce (the ''Department'') published a notice of opportunity to request an administrative review of the countervailing duty order on LWS from the PRC. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 74 FR 41120 (August 14, 2009), as amended. Changshu Xinsheng Bags Producing Company Ltd. (''Changshu'') and Zibo Aifudi Plastic Packaging Co., Ltd. (''Zibo Aifudi'') timely requested an administrative review of the countervailing duty order on LWS from the PRC for the period December 3, 2007 through December 31, 2008. In accordance with Section 751(a)(1) of the Tariff Act of 1930 (''the Act'') and 19 CFR 351.221(c)(1)(i), of the Department's regulations, the Department published a notice initiating an administrative review of the countervailing duty order. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 74 FR 48224 (September 22, 2009).

Rescission, in Part, of Countervailing Duty Administrative Review

The Department's regulations provide that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation. *See* 19 CFR 351.213(d)(1). Changshu, the only party to request a review of its particular sales of LWS, timely withdrew its request of the review within the 90-day deadline. Therefore, in accordance with 19 CFR 351.213(d)(1), the Department is rescinding this administrative review of the countervailing duty order with respect to Changshu. This administrative review will continue with respect to Zibo Aifudi.

Assessment

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess countervailing duties on all appropriate entries. For Changshu, countervailing duties shall be assessed, if applicable, at rates equal to the cash deposit or withdrawal from warehouse, for consumption. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protection orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3) of the Department's regulations, which continues to govern business proprietary information in this segments of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, as amended, and 19 CFR 351.213(d)(4).

Dated: November 30, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–29005 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT18

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that an Exempted Fishing Permit (EFP) application contains all of the required information and warrants further consideration and has made a preliminary determination that the activities authorized under this EFP would be consistent with the goals and objectives of the Monkfish Fishery Management Plan (FMP). However, further review and consultation may be necessary before a final determination is made to issue an EFP. This EFP would grant exemptions from the Monkfish Day-at-Sea (DAS) Program, as well as exempt vessels from the monkfish minimum size limits for onboard tagging purposes only.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments must be received on or before December 21, 2009.

ADDRESSES: You may submit written comments by any of the following methods:

- Email: *NERO.EFP@noaa.gov*. Include in the subject line ''Comments on the GMRI Monkfish Tagging EFP.''
- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, NE Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on the GMRI monkfish tagging EFP, DA9–229.''
- Fax: (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Anna Macan, Fishery Management Specialist, 978–281–9165.

SUPPLEMENTARY INFORMATION: The Gulf of Maine Research Institute (GMRI), in response to a NMFS notice published in the **Federal Register** on June 17, 2009 (50 CFR 28668), submitted a request to use 51 unallocated 2009 Monkfish Research Set-Aside (RSA) DAS as exempted DAS to conduct research activities associated with an ongoing study to investigate large-scale movements and habitat use of monkfish. These 51 exempted DAS would allow GRMI to resume research activities for a 2008 monkfish RSA project that had to be scaled back due to a budget shortfall resulting from the inability to use all of the 2008 monkfish RSA DAS allocated to the project.

This EFP would allow up to 29 vessels to conduct tagging research in the Southern Fishery Management Area (SFMA) in conjunction with normal commercial fishing operations, using standard commercial gillnets. The goal of the project is to investigate large-scale movements of monkfish and to compare inferences about movement and habitat use from conventional and acrchival tags and otolith trace element analysis. Conventional tagging efforts would be conducted by trained captains or crew while under normal commercial fishing operations. Up to 25–50 monkfish per trip would be tagged, over the course of 51 fishing days. Data storage tags, up to 10 per trip, would only be deployed when GMRI staff is onboard.

This EFP would exempt the participating vessels from the monkfish DAS requirements found at 50 CFR 648.92(b)(1)(i) for a total of 51 DAS. A DAS exemption would reduce the cost to participating vessels, by not requiring them to expend their DAS allocation to conduct the research. This EFP would also exempt participating vessels from the monkfish minimum size restrictions at § 648.93 for the purpose of tagging monkfish during research activities. No fish below the minimum size would be landed for sale. Aside from these exemptions, fishing activities would be conducted under normal commercial practices.

The applicant may request minor modifications and extensions to the EFP throughout the year. EFP modifications and extensions may be granted without further notice if they are deemed essential to facilitate completion of the proposed research and have minimal impacts that do not change the scope or impact of the initially approved EFP request. Any fishing activity conducted outside the scope of the exempted fishing activity would be prohibited.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 1, 2009.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E9–28992 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Foreign–Trade Zone 2—New Orleans, Louisiana, Area

Site Renumbering Notice

Foreign–Trade Zone 2 was approved by the Foreign–Trade Zones Board on July 16, 1946 (Board Order 12), had eleven boundary changes from 1950–1969 (Board Orders 22, 36, 40, 45, 49, 52, 56, 64, 67, 70 and 79), and expanded on April 9, 1984 (Board Order 245), on May 8, 1986 (Board Order 331), on November 13, 1991 (Board Order 544), on August 25, 1998 (Board Order 1000), and on December 30, 2003 (Board Order 1310).

FTZ 2 currently consists of 24 ''sites'' totaling some 1301.74 acres in the New Orleans area. The current update does not alter the physical boundaries that have previously been approved, but instead involves an administrative renumbering of existing Site 5 to separate unrelated, non–contiguous sites for record–keeping purposes. Existing Site 5 consists of 37 separate ''parcels'' located at or adjacent to the Port of New Orleans. With this renumbering, the parcels will be designated as Sites 25 thru 61. Site

number 5 will not be reused. The other existing sites will not be affected.

Under this revision, the site list for FTZ 2 will be as follows: *Site 1* (2 acres, expires 7/1/2011) -- 1015 Distributors Row, Harahan; *Site 2* (76 acres) -- Almonastar–Michoud Industrial District, Inner Harbor Navigation Canal and the Mississippi River Gulf Outlet; *Site 3* (534 acres) -- Newport Industrial Park, Paris Road, New Orleans; *Site 4* (4 acres) -- 200 Crofton Road, Kenner (adjacent to the New Orleans International Airport); *Site 6* (136 acres) -- Arabi Terminal and Industrial Park located at Mile Point 90.5 on the Mississippi River, Arabi; *Site 7* (216 acres) -- Chalmette Terminal and Industrial Park, Old Kaiser Plant, St. Bernard Highway, New Orleans; *Site 8* (1.49 acres) -- 4501 North Galvez Street, New Orleans; *Site 9* (1.42 acres) -- 1560 Tchoupitoulas Avenue, New Orleans; *Site 10* (3.15 acres) -- 5301 Jefferson Highway, New Orleans; *Site 11* (4.59 acres) -- 700 Edwards Avenue, New Orleans; *Site 12* (6.65 acres, expires 8/31/2011) -- 333 Edwards Avenue, Jefferson Parish; *Site 13* (4.05 acres, expires 8/31/2011) -- 415 Edwards Avenue, Jefferson Parish; *Site 14* (2.29 acres, expires 8/31/2011) -- 5725 Powell Street, Jefferson Parish; *Site 15* (7.6 acres, expires 8/31/2011) -- 6040 Beven Street, Jefferson Parish; *Site 16* (5 acres, expires 8/31/2011) -- 325 Hord Street, Jefferson Parish; *Site 17* (19.12 acres, 4 parcels, expires 8/31/2011) -- Port of New Orleans Nashville Avenue Terminal Complex located at Nashville Avenue and Grain Elevator Road; *Site 18* (5.5 acres, expires 8/31/2011) -- 5050 Almonster Avenue, New Orleans; *Site 19* (4.89 acres, expires 8/31/2011) -- 5042 Bloomfield Street, Jefferson; *Site 20* (1.4 acres, expires 8/31/2011) -- Port of New Orleans Alabo Street Terminal; *Site 21* (17.23 acres, 6 parcels, expires 8/31/2011) -- Port of New Orleans Louisiana Avenue Marine Terminal Complex; *Site 22* (29.34 acres, expires 8/31/2011) -- 4300 Jourdan Road, New Orleans; *Site 23* (10.58 acres, expires 8/31/2011) -- 13601 Old Gentilly Road, New Orleans; *Site 24* (27.3 acres, expires 8/31/2011) -- 4010 France Road Parkway, New Orleans; *Site 25* (7 acres) -- 5200 Coffee Drive, New Orleans; *Site 26* (2 acres) -- 601 Market Street, New Orleans; *Site 27* (2 acres) -- 1601 Tchoupitoulas Street, New Orleans; *Site 28* (12 acres) -- 5630 Douglas Street, New Orleans; *Site 29* (9 acres) -- 6230 Bienvenue Street, New Orleans; *Site 30* (7 acres) -- 1400 Montegut Street, New Orleans; *Site 31* (1 acre) -- 1645 Tchoupitoulas Street, New Orleans; *Site 32* (1 acre) -- 1770 Tchoupitoulas Street, New Orleans; *Site 33* (9 acres) -- 1930 Japonica Street, New Orleans; *Site 34* (2 acres) -- 2941 Royal Street, New Orleans; *Site 35* (2.52 acres) -- 600 Market Street, New Orleans, 1662 St. Thomas Street, New Orleans and 619 St. James Street, New Orleans; *Site 36* (1 acre) -- 3101 Charters Street, New Orleans; *Site 37* (1 acre) -- 2601 Decatur Street, New Orleans; *Site 38* (1 acre) -- 2520 Decatur Street, New Orleans; *Site 39* (13 acres) -- 5300 Old Gentilly Boulevard, New Orleans; *Site 40* (8 acres) -- 4400 Florida Avenue, New Orleans; *Site 41* (2 acres) -- 410/420/440 Josephine Street, New Orleans and 427 Jackson Avenue, New Orleans; *Site 42* (7 acres) -- 500 Louisiana Avenue, New Orleans; *Site 43* (1 acre) -- 500 N. Cortez Street, New Orleans; *Site 44* (3 acres) -- 720 Richard Street, New Orleans; *Site 45* (12 acres) -- 701/801 Thayer Street, New Orleans and 700/800 Atlantic Street, New Orleans; *Site 46* (9 acres) -- 500 Edwards Avenue, New Orleans; *Site 47* (9 acres) -- 14100 Chef Menteur Highway, New Orleans; *Site 48* (1 acre) -- 2114–2120 Rousseau Street, New Orleans; *Site 49* (10 acres) -- 1000 Burmaster Street, New Orleans; *Site 50* (7 acres) -- 6025 River Road, New Orleans; *Site 51* (17 acres) -- 620/640 River Road, New Orleans; *Site 52* (1 acre) -- 1806 Religious Street, New Orleans; *Site 53* (3 acres) -- 1050 S. Jeff Davis Parkway, New Orleans; *Site 54* (2 acres) -- 1600 Annunciation Street, New Orleans; *Site 55* (5 acres) -- 402 Alabo Street, New Orleans; *Site 56* (4 acres) -- 4400 N. Galvez Street, New Orleans; *Site 57* (2 acres) -- 1883 Tchoupitoulas Street, New Orleans; *Site 58* (2 acres) -- 2311 Tchoupitoulas Street, New Orleans; *Site 59* (2 acres) -- 2940 Royal Street, New Orleans; *Site 60* (1.62 acres) -- 4403/4405 Roland Street, New Orleans; and, *Site 61* (3 acres) -- 6101 Terminal Drive, New Orleans.

For further information, contact Camille Evans at Camille.Evans@trade.gov or (202) 482–2350.

Dated: November 24, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–29002 Filed 12–03–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS23

Small Takes of Marine Mammals Incidental to Specified Activities; Dumbarton Bridge Seismic Retrofit Project, California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: SNMFS has received an application from the California Department of Transportation (Caltrans) for an Incidental Harassment Authorization (IHA) to take marine mammals, by Level B harassment, incidental to retrofitting the Dumbarton Bridge, located in southern San Francisco Bay (Bay), California. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to Caltrans to incidentally harass harbor seals (Phoca vitulina richardii), California sea lions (*Zalophus californianus*), and gray whales (*Eschrichtius robustus*) during the specified activity.

DATES: Comments and information must be received no later than January 4, 2010.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.0648–XS23@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size. NMFS is not responsible for comments sent to addresses other than the ones listed here.

All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Summary of Request

On April 17, 2009, NMFS received a request from Caltrans to harass marine mammals incidental to the Dumbarton Bridge Seismic Retrofit Project. The application was determined complete on August 29, 2009. The Dumbarton Bridge, located in southern San Francisco Bay (Bay), was designed in the late 1970s based on the design standards that Caltrans established in 1971. Since that time, upgraded standards have been issued, particularly Caltrans' Seismic Design Criteria of 1999, of which the bridge does not meet. The Dumbarton Seismic Retrofit Project would provide a seismic upgrade of the Dumbarton Bridge to meet these current requirements.

To allow access to shallow water (<10 ft) piers which need to be retrofitted, a temporary trestle supported by 24–inch hollow steel piles must be installed; a barge will allow access to piers in deeper water. In addition, cofferdams will be created using sheet piles to pour concrete collars around pre-existing piles to strengthen the piers. Installation of the temporary steel and sheet piles necessitates use of mainly vibratory hammers, but an impact hammer may be used for proofing up to two piles each day. The entire retrofit project is expected to take three years to complete; however, installation of the temporary piles is expected to take approximately 4 months and installation of sheet piles could take one year. All other work would be on-land. Because pile driving has the potential to disturb marine mammals in the area, Caltrans is requesting a one-year authorization to harass marine mammals incidental to this specified activity.

Construction Process

The existing bridge span is approximately 8,600 ft (2,261 m) long and 85 ft (26 m) wide and provides access for approximately 80,000 trips across the Bay between Alameda and San Mateo counties each day. The bridge consists of three structural types in five sections. The five sections include a main channel crossing at the center of the bridge, two approach sections (one each on the eastern and western sides), and two trestle structures (one on each end) that anchor the bridge (see Figure 1–2 in the application). Seismic retrofit activities would take place on all five sections of the bridge; however, only a portion of the project contains the activity which could result in the take of marine mammals: pile driving.

Retrofitting itself involves strengthening connections between columns, pedestals, and pile caps which does not involve introducing intense sound production. Pile driving; however, does result in elevated in-air and in-water noise levels; therefore, this activity may impact marine mammals in the vicinity of the operating pile driver. It should be noted that some of the specifics of the project (e.g., percent of vibratory pile driving vs. impact pile driving) have been altered from description in the MMPA IHA application as a result of NMFS' recommendations. Therefore, the following description accurately describes the pile driving process Caltrans currently proposes.

Approach Sections

The approach sections adjacent to the main channel bridge crossing are supported by a series of piers. The western approach section is 2,580 ft (786 m) long and extends from Pier 1 to Pier 15. The eastern approach section is 2,600 ft (792 m) long, extending from Pier 32 to Pier 44. Seismic upgrades on these piers include retrofitting the existing piers through strengthening the connection between the columns, pedestals and pile caps with the installation of a reinforced concrete collar. In order to perform the concrete work, temporary work trestles and cofferdams will be installed for work access and to dewater the areas around the piers. In addition, trestles would facilitate removal of the adjacent Ravenswood Pier. Upon completion of the Dumbarton Bridge Seismic Retrofit Project, temporary trestles, cofferdams, barges and other falsework will be removed from the area.

Caltrans estimates approximately 1,000 temporary hollow steel pipe piles, with a maximum diameter of 24–inches, will be needed to construct the trestles. Piles associated with the temporary trestles would only be installed in water less than 10 ft in depth and would be driven out of water whenever possible (e.g., on the mudbanks at low tide). The piles will be inserted in rows of three, with approximately 25 ft (7.6 m) between each row. Temporary trestle superstructure (decking) will then be constructed atop the support piles. An additional 16 piles will extend from the temporary work trestle to surround each

existing support pier to allow construction around all sides of the pier. All temporary trestles will be less than 25 ft wide. Caltrans will install a maximum of 12 piles per day (six on each side of the Bay) using mainly a vibratory pile driving method. Vibration installation will start and continue for 5 minutes followed by an approximate 30–minute delay. The second pile will be vibrated into place for 5 minutes. Bent members and spans will then be erected, possibly taking 2 to 3 hours before the second set of piles is vibrated into place.

In total, vibratory pile driving would not occur for more than two hours per day. In order to verify load capacity of the temporary piles, approximately one in eight piles (12 percent) will be ''tapped'' with an impact hammer for proofing. Each pile to be tested would be tapped for a total of 10–1 5 seconds. No more than two piles per day would need testing. Vibratory pile driving may occur at any time during the year; however, when ESA-listed steelhead may be present (December 1st to June 14th), the re-tap or use of an impact hammer is restricted to low-tide periods only to minimize impact to salmonids.

Caltrans estimates construction of the temporary trestles will take approximately three weeks total. The temporary piles are expected to remain in the Bay for a period of three years and would be removed after retrofitting is complete. No trestle will be constructed in the main channel as all work in the channel will take place from a stationary barge.

In addition to the trestle, cofferdams will be created around piles facilitate installation on the concrete collars which will strengthen the bridge. Cofferdams will be created around 20 piers (piers 5–15 and 32–40) by vibrating steel sheet piles into place around each pier. Once the sheet piles are in place (2 ft from the edges of the existing piles caps and driven to approximately 15 ft) the space between the sheet piles and the piers would be dewatered. Once drained, a concrete collar providing seismic support will be poured in the cofferdam. Upon hardening, the sheet piles will be removed.

Existing Trestle Structures

Caltrans would also retrofit existing trestle structures on land at the east and west ends of the bridge to provide lateral strengthening. Each trestle is 600 ft long. To accomplish this, Caltrans would install of a total of 28 permanent 48–inch steel pipe piles close to the waters edge but not in the water; distance to the water is dependent upon the tidal stage. Fourteen of these piles would be placed on already paved road and fourteen would be placed into weedy ruderal vegetation enclosed by parking islands and the trestle itself. A maximum of four piles per day would be installed requiring 30–minutes driving time. These piles would be installed between October 1 and November 30 to avoid salmon migration periods. Although these piles would be driven on land, noise from impact hammering could propagate into the water from vibration and through the air-water interface (see Table 1 below). Therefore, NMFS considered impacts of land based pile driving when assessing impacts to marine mammals.

Main Channel Crossing

The main channel crossing is approximately 3,000 ft (914 m) long and spans the South Bay channel, which is about 2,500 ft (762 m) wide, extending from piers 16–31. No in-water construction will occur for retrofitting the main channel crossing. Barges and small marine vessels will be used to transport equipment to the main channel crossing. Structural improvements to the bridge hinges located within the superstructure (roadway bed), and on substructure (such as pedestals located above the pile caps, and on bent caps located immediately below the superstructure) will occur from the existing roadway or from atop barges. All tugs pushing or supporting barge placement are slow moving or, once in place, stationary. Caltrans would not actively approach any marine mammals, in accordance with NMFS viewing guidelines, in tugs or any other support vessels.

Some components of the project, as described in the application (e.g., creation of a construction of a barrier to keep high-tide water from encroaching onto the bridge, creation of a drainage system, and the removal of Ravenswood pier), would not involve introduction of noise into the environment or substantial marine mammal habitat related impacts and are not expected to harass marine mammals. Therefore, NMFS has preliminary determined that these specified activities do not warrant an authorization to incidentally harass marine mammals, and they will not be discussed further here. For more information on NMFS' determinations of these activities on ESA-listed salmonids, please refer to the August 10, 2009 Biological Opinion issued to Caltrans for this action.

Action Area

The Dumbarton Bridge Project site, including the area around the bridge piers and the area necessary to accommodate construction-related equipment such as work barges and cranes, is located in the south Bay, between Fremont and Menlo Park in East Palo Alto, California (see Figure 1–1 in application). The bridge is a major east/west connector between Interstate 880 in Alameda County and U.S. Highway 101 in San Mateo County. It is surrounded by open bay, salt ponds, salt marshes, mudflats, vernal pools and, on the eastern end, the Don Edwards San Francisco Bay National Wildlife Refuge. These habitats are home to a variety of important species, including protected birds, fish, and marine mammals, that are protected by a variety of environmental regulations. At high tide, water depth on the surrounding flats ranges from 1–10 ft (0.3–3 m), depending on local conditions. At low tide, the flats are exposed, hence pile driving may not always be occurring in-water.

Affected Environment

At least 35 marine mammal species can be found off the coast of California; however, few venture into the Bay and only Pacific harbor seals and California sea lions inhabit the southern portion of the Bay regularly. Gray whales are sighted in the Bay during their yearly migration, though most sightings tend to occur in the central Bay. Humpback whales (*Megaptera noveangliae*), while sometimes present in the central Bay, are rare in the south and are not expected to be present within the action area. Therefore, humpback whales will not be considered further in this analysis and no take authorization is requested or proposed for this action.

Harbor Seals

The Pacific harbor seal impacted by this project belong to the California stock which is not listed as depleted under the MMPA or endangered or threatened under the Endangered Species Act (ESA). The most current stock assessment report estimates a population of 34,233 (NMFS 2005). More site specific, a recent marine mammal study conducted before and during seismic retrofit work on the Richmond San Rafael Bridge (RSRB) in the northern Bay included extensive monitoring of marine mammals at points throughout the Bay, including the Central and South Bay areas. This study concluded that at least 500 seals populate the Bay, an estimate which closely agrees with previous seal counts, which ranged from 524 to 641 seals from 1987 to 1999 (Goals Project 2000).

Harbor seals generally do not migrate and display year-round site fidelity,

though they have been known to swim several hundred miles to find food or suitable habitat. Seals within the Bay engage in limited seasonal movements associated with foraging and breeding activities (Kopec and Harvey 1995), and seals in the South Bay may make daily northward foraging excursions.

Although generally solitary in the water, harbor seals come ashore at communal sites known as ''haul-outs,'' which are used for resting, thermoregulation, birthing, and nursing pups (see figure 4–1. in the application for haul-out sites in the Bay). Haul-out locations are relatively consistent from year to year (Kopec and Harvey, 1995), and females have been recorded returning to their own natal haul-out when breeding (Green *et al.*, 2006). Bay harbor seals haul out in groups ranging in size from a few individuals to several hundred seals. Bay haul-out sites that support some of the largest concentrations of seals include Mowry Slough (located approximately 4 miles south of the project site), Corte Madera Marsh, Castro Rocks, and Yerba Buena Island in the Central Bay (all approximately 25 to 35 miles north of the project site). The haul-out site closest to the bridge is at Newark Slough, approximately 2.7 miles south of the project site, near the junction of Newark Slough and Plummer Creek. Although the Newark Slough haul-out is a known pupping site, relatively few harbor seals use the site. Both Newark and Mowry sloughs are used by seals continuously year-round but have higher numbers of seals during pupping and molting seasons (spring and summer). Because of the location of these two sites are on the southern side of a spit of land, the bridge is not visible from these locations. Hence, construction activities would not be visible to seals at the haul-outs. Other South Bay haul-outs include Coyote Point, Seal Slough, Belmont Slough, Bair Island, Corkscrew Slough, Greco Island, Ravenswood Point, Hayward Slough, Dumbarton Point, Calaveras Point, Drawbridge, and Guadalupe Slough (Goals Project, 2000). Caltrans' IHA application contains a map with locations of these haul-outs relative to the Dumbarton Bridge.

In addition to Newark and Mowry haul-outs, there is one foraging area identified close to the bridge. The most numerous prey items identified in harbor seal fecal samples from haul-out sites in the Bay include yellowfin goby (*Acanthogobius flavimanus*), northern anchovy (*Engraulis mordax*), Pacific herring (*Clupea harengus pallasi*), staghorn sculpin (Leptocottus armatus), plainfin midshipman (Porichthys notatus), and white croaker (Genyonemus lineatas) (Harvey and Torok, 1994).

Pinnipeds produce a wide range of hearing social signals, most occurring at relatively low frequencies (Southall *et al.*, 2007), suggesting hearing is keenest at these frequencies. Pinnipeds communicate acoustically both on land and in the water suggesting they possess amphibious hearing and have difference hearing capabilities dependant upon the media (air or water). Based on numerous studies, as summarized in Southall *et al.* (2007), pinnipeds are more sensitive to a broader range of sound frequencies in water than in air. In-water, pinnipeds can hear frequencies from 75 Hz to 75 kHz. In-air, the lower limit remains at 75 Hz but the highest audible frequencies are only around 30 kHz (Southall, *et al.*, 2007).

California Sea Lions

California sea lions are endemic to the Northern Pacific Ocean, breeding in southern California and along the Channel Islands during the spring. They are not listed as depleted under the MMPA or as endangered or threatened under the ESA. The most current stock assessment report estimates there are approximately 238,000 sea lions in the U.S (NMFS, 2007). In the Bay, sea lions haul out primarily on floating docks at Pier 39 in the Fisherman's Wharf area of the San Francisco Marina and on buoys and similar structures throughout the Bay. They are seen swimming mainly off the San Francisco and Marin shorelines within the Bay but may occasionally enter the South Bay area to forage. Although not a frequent visitor to the southern portion of the Bay, sea lions have been sighted traveling through the area, most likely for foraging opportunities. Their diet consists primarily of pacific herring, northern anchovy, and sardines. Sea lions rarely haul-out in the southern Bay.

Gray Whales

Gray whales, a large baleen whale, potentially affected by the proposed project belong to the Eastern North Pacific stock. This stock is not listed as depleted under the MMPA and was de-listed from the ESA in 1994 (59 FR 31094). Currently, this stock's population is estimated at approximately 18,813 individuals (NMFS, 2008). Eastern gray whales migrate each year along the west coast of North America, feeding in northern waters primarily off Alaska during the summer before heading to breeding and calving grounds off Mexico over the winter. Their migrations take them past the San Francisco coast from December through February, heading south, and again from mid-February through July, heading north. During the migration, gray whales will occasionally enter rivers and bays (such as the Bay) along the coast but not in high numbers. Individual whales may use the shallow Bay waters for foraging, or they may simply be off course. Gray whales are the only baleen whales known to feed on the sea floor, where they scoop up bottom sediments to filter out benthic crustaceans, mollusks, and worms.

No acoustical measurements of gray whale hearing have been published. However, gray whales likely hear sounds in the 50 to 500 Hz range, and baleen whale sounds, though mostly below 1 kHz, are common up to 8 kHz. However, the low and high end limits of hearing for gray whales are unknown (Richardson *et al.* 1995).

Impacts to Marine Mammals

As stated, noise from pile driving has the potential to harass marine mammals present in the action area. Sound is a physical phenomenon consisting of minute vibrations that travel through a medium, such as air or water. Sound is generally characterized by several variables, including frequency and sound level. Frequency describes the sound's pitch and is measured in hertz (Hz) or kilohertz (kHz), while sound level describes the sound's loudness and is measured in decibels (dB). Sound level increases or decreases exponentially with each dB of change. For example, 10–dB yields a sound level 10 times more intense than 1 dB, while a 20 dB level equates to 100 times more intense, and a 30 dB level is 1,000 times more intense. Sound levels are compared to a reference sound pressure (micro-Pascal) to identify the medium. For air and water, these reference pressures are ''re: 20 microPa'' and ''re: 1 microPa'', respectively. All underwater noise levels presented here are quantified in decibels relative to 1 microPa (dB, re: 1 microPa) unless otherwise noted.

Marine mammals are continually exposed to many sources of sound. Naturally occurring sounds such as lightning, rain, sub-sea earthquakes, and biological sounds (e.g., snapping shrimp, whale songs) are ubiquitous throughout the world's oceans. Marine mammals produce sounds in various contexts and use sound for various biological functions including, but not limited to, (1) social interactions; (2) foraging; (3) orientation; and (4) predator detection. Interference with producing or receiving these sounds may result in adverse impacts. Audible

distance, or received levels (RLs) will depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor to the sound (Richardson *et al.*, 1995). Type and significance of marine mammal reactions to noise are likely to dependent on a variety of factors including, but not limited to, the behavioral state (e.g., feeding, traveling, etc.) of the animal at the time it receives the stimulus, frequency of the sound, distance from the source, and the level of the sound relative to ambient conditions (Southall *et al.*, 2007).

Hearing Impairment

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very loud sounds. Hearing impairment is measured in two forms: temporary threshold shift (TTS) and permanent threshold shift (PTS). There are no empirical data for onset of PTS in any marine mammal; therefore, PTS- onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is presumed to be likely if the hearing threshold is reduced by ≥ 40 dB (i.e., 40 dB of TTS). Due to proposed mitigation measures and source levels, NMFS does not expect that marine mammals will be exposed to levels that could elicit PTS; therefore, it will not be discussed further.

Temporary Threshold Shift (TTS)

TTS is the mildest form of hearing impairment that can occur during exposure to a loud sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be louder in order to be heard. TTS can last from minutes or hours to, in cases of strong TTS, days. For sound exposures at or somewhat above the TTS-onset threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals. Southall *et al.* (2007) considers a 6 dB TTS (i.e., baseline thresholds are elevated by 6 dB) sufficient to be recognized as an unequivocal deviation and thus a sufficient definition of TTS-onset. Because it is non-injurious, NMFS considers TTS as Level B harassment that is mediated by physiological effects on the auditory system; however, NMFS does not consider onset TTS to be the lowest level at which Level B harassment may occur.

Sound exposures that elicit TTS in pinnipeds underwater have been measured in harbor seals, California sea lions, and northern elephant seals from broadband or octaveband (OBN) non-pulse noise ranging from approximately 12 minutes to several hours and pulse noise (Kastak and Schusterman, 1996; Finneran *et al.*, 2003; Kastak *et al.*, 1999; Kastak *et al.*, 2005). Collectively, Kastak *et al.* (2005) analyzed these data to indicate that in the harbor seal, a TTS of ca. 6 dB occurred with 25 minute exposure to 2.5 kHz OBN with SPL of 152 dB re:1 microPa; the California sea lion showed TTS-onset at 174 dB re: 1 microPa (as summarized in Southall *et al.*, 2007). Underwater TTS experiments involving exposure to pulse noise is limited to a single study. Finneran *et al.* (2003) found no measurable TTS when two California sea lions were exposed to sounds up to 183 dB re: 1 microPa (peak-to-peak).

There are limited data available on the effects of non-pulse noise (e.g., vibratory pile driving) on pinnipeds in-water; however, field and captive studies to date collectively suggest that pinnipeds do not strongly react to exposures between 90–140 dB re: 1 microPa; no data exist from exposures at higher levels. Jacobs and Terhune (2002) observed wild harbor seal reactions to high frequency acoustic harassment devices (ADH) around nine sites. Seals came within 44 m of the active ADH and failed to demonstrate any behavioral response when received SPLs were estimated at 120–130 dB. In a captive study (Kastelein, 2006), a group of seals were collectively subjected to data collection and communication network (ACME) non-pulse sounds at 8–16 kHz. Exposures between 80–107 dB did not induce strong behavioral responses; however, a single observation at 100–110 dB indicated an avoidance response at this level. The group returned to baseline conditions shortly following exposure. Southall *et al.* (2007) notes contextual differences between these two studies noting that the captive animals were not reinforced with food for remaining in the noise fields, whereas free-ranging subjects may have been more tolerant of exposures because of motivation to return to a safe location or approach enclosures holding prey items. While most of the pile driving will be vibratory, a small portion of piles will be driven using an impact hammer (pulse noise). Southall *et al.* (2007) reviewed relevant data from studies involving pinnipeds exposed to pulse noise and concluded that exposures to 150 to 180 dB generally have limited potential to induce avoidance behavior.

Seals and sea lions exposed to threshold level sounds in water (160 dB for pulse sounds (e.g., impact pile driving) or 120 dB for non-pulse sounds (e.g., vibratory pile driving)) may elicit temporary avoidance behavior around the bridge which may affect the routes of seals under the bridge or temporarily inhibit them from foraging near the bridge. However, limiting pile driving to two hours per day would allow for minimal disruption of harbor seal foraging or dispersal habitat under or near the bridge. Even more limited impacts to foraging or haul-out for sea lions are anticipated because very few sea lions use the South Bay for foraging and no known sea lion haul-outs exist in the South Bay. The bridge area is not a regular or commonly used foraging or calving area for gray whales; therefore, project construction activities are not expected to affect whale foraging or reproductive success within the Bay.

The individual piers on the bridge which are to be retrofitted are spaced at approximately 100–350–ft (30–106 m) intervals. The rows of piles for the temporary construction trestles will be spaced at 25–ft (7.6 m) intervals. The temporary trestle will reach bayward to the 10–ft (3 m) depth contour with the top of the trestle approximately seven feet above sea level. The temporary trestle will not span the main channel, which remains open, allowing passage of marine mammals through the project area. Therefore, the construction work will not present any physical barrier to marine mammals that may move between the haul-out sites and foraging areas.

Hauled-out seals are vulnerable to stresses caused by human disturbance, especially during pupping and molting seasons. Studies have shown seals may react negatively to humans coming within 300 to 570 feet (Green *et al.*, 2006) and may temporarily abandon their haul-outs or experience reduced reproductive success (Calambokidis *et al.*, 1979). Construction-related impacts to seals in the form of alert and flush disturbances were recorded during the Richmond San Rafael Bridge (RSRB) monitoring (Green *et al.*, 2006). Seals hauled out at Castro Rocks, located 82 to 280 feet from the RSRB, were disturbed by various construction-related activities, including noise and boating activity. However, during the pile installation demonstration project (PIDP) for the seismic retrofit of the East Span of the Bay Bridge, seals at the Yerba Buena Island haul-out initially became alerted when at a distance of approximately 0.94 miles, but quickly became acclimatized (Parsons Brinckerhoff, 2001).

Hauled-out seals at Newark Slough (the closest haul-out located 2.7 miles south of the bridge) or other South Bay

haul-outs are not expected to be affected by project-related activities. Support vessel activities would be primarily north of or adjacent to the Dumbarton Bridge, and pile driving would only occur at the bridge. The in-air harassment threshold (90 dB re: 20 microPa) distance for harbor seals from pile driving is not expected to reach more than 800 ft (244 m). Given the distance to the closest haul-out (Newark Slough) is 2.7 miles away, NMFS does not anticipate seals on haul-outs would be affected as a result of the project.

Proposed Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses. Caltrans has proposed mitigation both in their application and supplemental communication to reduce impact to environmental resources. Measures set in place to protect birds and fish (e.g., using the vibratory hammer at all times except for load bearing tests) also protect marine mammals. The following proposed mitigation measures are designed to eliminate potential for injury and reduce harassment levels to marine mammals.

Limited use of Impact Hammer

As a result of Section 7 consultation discussions with NMFS (to reduce impacts to ESA-listed fish species), Caltrans has agreed to drive all temporary piles with a vibratory hammer with the exception of one pile per day being ''proofed'' with an impact hammer which has a higher source level. Proofing requires approximately 20 blows per pile which equates to approximately 15–20 seconds of impact hammering per day. As a result of Section 7 consultation, Caltrans would limit proofing piles during low tide only, essentially out-of-water on the mudbanks, when ESA-listed steelhead salmon are present (December 1 to June 14).

Establishment of safety and zones and shut down requirements

Although the isopleths to the 190dB and 180dB harassment thresholds, are modeled to be within 220 ft (67 m) of the pile hammer (see Table 1), Caltrans would shut down or delay commencement of pile driving should a marine mammal come within or approach 250 ft (76m) of the pile being driven. The aforementioned threshold levels are based on an assumption that exposure to lower received levels will not injure these animals or impair their hearing abilities, but that higher received levels might have such effects. It should be understood that marine mammals inside these safety zones will not necessarily be injured or seriously injured or killed as these zones were established prior to the current understanding that significantly higher levels of impulse sounds would be required before injury or mortality could occur (see Southall *et al.*, 2007).

Soft start to pile driving activities

A ''soft start'' technique will be used at the beginning of each pile installation to allow any marine mammal that may be in the immediate area to leave before impact piling reaches full energy. The soft start requires contractors to initiate noise from vibratory hammers for 15 seconds at reduced energy followed by 1–minute waiting period. The procedure will be repeated two additional times. Due to the short duration of impact pile driving (20 seconds), general ramp-up requirement for impact pile driving do not apply as it would actually increase the duration of noise emitted into the environment and monitoring should effectively detect marine mammals within or near the designated safety zone of 250 ft (76 m). If any marine mammal is sighted within or approaching the safety zone prior to pile-driving, Caltrans will delay pile-driving until the animal has moved outside and on a path away from such zone or after 15 minutes have elapsed since the last sighting of the marine mammal.

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of affecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) the manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation, including consideration of personnel safety and practicality of implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

Visual Monitoring

At least one week prior to the start of construction, the protected species observers (PSOs), trained in detection and identification of marine mammals, will conduct a survey effort in order to establish baseline data of marine mammal use in the project area. This effort will consist of 12 hours of monitoring during the work window that will be used during construction (0700 to 1900 hrs).

Safety zone monitoring will be conducted during all active pile driving. Modeling suggests the 190dB and 180dB isopleths are located 60 ft (18 m) and 220 ft (67 m) from steel piles being driving with an impact hammer and even less so for vibratory pile driving. As a conservative measure, Caltrans is proposing a 250 ft (76 m) safety zone (i.e., mandatory shut down zone) until acoustic measurements can be made to confirm the distances identified in Table 1 above are accurate. Should acoustic studies deem these distances are not accurate, they will be adjusted accordingly. Pile driving will not begin until the safety zone is clear of marine mammals and will be stopped in the event that marine mammals enter the safety zone. SPOs will begin monitoring at least 30 minutes prior to the commencement of pile driving. Data collection will consist of a count of all pinnipeds and cetaceans by species, a description of behavior (based on the Richmond Bridge Harbor Seal Survey classification system), sex and age class, if possible, location, direction of movement, type of construction that is occurring, time that pile driving begins

and ends, any acoustic or visual disturbance, and time of the observation. Environmental conditions such as wind speed, wind direction, visibility, temperature, tide level, current, and sea state (described using the standard Beaufort sea scale) would also be recorded.

Monitoring of marine mammals will be conducted using high quality binoculars (e.g., Zeiss, 10 x 42 power). When possible, digital video or 35 mm still cameras will also be used to document the behavior and response of marine mammals to construction activities or other disturbances. Each monitor will have a radio for contact with other researchers or work crews if necessary, a GPS unit for determining observation location, and an electronic range finder to determine distance to marine mammals, boats, buoys and construction equipment. Most likely observers will conduct the monitoring from the Dumbarton Bridge surface or catwalks, providing a high vantage point for the observer; however, should a small vessel be used to monitor for marine mammals, PSOs will remain 50 yards from swimming pinnipeds in accordance with NMFS marine mammal viewing guidelines (*http://swr.nmfs.noaa.gov/psd/rookeryhaulouts/CASEALVIEWBROCHURE.pdf*). This will prevent additional harassment to pinnipeds from the vessel.

Acoustic Monitoring

Hydroacoustic monitoring would be conducted by a qualified monitor during pile-driving activities when piles are being driven in water greater than 3 feet in depth. Details would be developed during work plan preparation, but might include monitoring one pile in every set of 3 piles during installation of the temporary trestles. A reference location would be established at the estimated 180 dB contour (distance of 230 feet from the pile driving). Sound measurements would be taken at the reference location and at locations every 20 feet until the 180 dB level is found. Measurements would be taken at two depths: one in mid water column and one near the bottom but at least 3 feet above the bottom, unless obstructions such as land force a variation in depth or number of measurements. Marine mammal safety zones would be adjusted to maintain a safety zone outside of 180 dB, according to the results of this monitoring.

Reporting

Data collection will consist of a count of all pinnipeds and cetaceans by species, a description of behavior (based on the Richmond Bridge Harbor Seal Survey classification system), sex and age class, if possible, location, direction of movement, type of construction that is occurring, time that pile driving begins and ends, any acoustic or visual disturbance, and time of the observation. Environmental conditions such as wind speed, wind direction, visibility, temperature, tide level, current, and sea state (described using the standard Beaufort sea scale) would also be recorded. Monitoring reports including the above listed information would be submitted to NMFS weekly. In addition, a final report summarizing all marine mammal monitoring and construction activities will be submitted to NMFS 90 days after the IHA expires.

Estimated Take by Harassment

NMFS typically proposes threshold sound levels to establish appropriate mitigation. Current NMFS practice regarding exposure of marine mammals to anthropogenic noise is that in order to avoid injury of marine mammals (e.g., PTS), cetaceans and pinnipeds should not be exposed to impulsive sounds of 180 and 190 dB rms or above, respectively. This level is considered precautionary as it is likely that more intense sounds would be required before injury would actually occur (Southall *et al.*, 2007). As such, Caltrans has proposed safety zones based on hydroacoustical modeling for the pile sizes and type of hammers used for the Dumbarton Bridge project and water depth. The model simulates spherical spreading and uses a transmission constant of 15. Potential for behavioral harassment (Level B) is considered to have occurred when marine mammals are exposed to sounds at or above 160 dB rms for impulse sounds (e.g., impact pile driving) and 120dB rms for non-pulse noise (e.g., vibratory pile driving), but below the aforementioned thresholds. These levels are considered precautionary. Estimated distances to NMFS current threshold sound levels from pile driving during the proposed action are outlined in Table 1 below (see Chapter 7 and Appendix A in the application for further detail how these distances were derived).

TABLE 1: MODELED UNDERWATER DISTANCES TO NMFS' MARINE MAMMAL HARASSMENT THRESHOLD LEVELS.

Driving Location	Pile Type	Hammer Type	Calculated Distance to Criteria Thresholds[1]			
			190 dB	180 dB	160 dB	120 dB
Water	24 " steel	Impact	60 ft (18m)	220 ft (67m)	3,300 ft (1005m)	n/a
Water	24 " steel	Vibratory	n/a	10 ft (3m)	n/a	3.2 miles (5.14 km)
Water	Sheet pile	Vibratory	n/a	5 ft (1.5m)	n/a	1.4 miles (2.25 kms)
Land	48" steel	Impact	n/a	100 ft (30.5 m)	1,475 ft (500m)	n/a
Land	Steel piles	Vibratory	0	0	0	150 ft (45.7 m)

[1]dB referenced to 1 microPa in water and to 20 microPa on land.

Current NMFS practice regarding in-air exposure of pinnipeds to noise generated from human activity is that the onset of Level B harassment for harbor seals and all other pinnipeds is 90 dB and 100 dB re: 20 micoPa, respectively. In-air noise calculations from pile driving for this project predict that noise levels will be reduced to approximately 83 dB re: 20 microPa at 800 m. Harbor seals or California sea lions are not known to haul-out this close to the bridge (the closest haul-out is 2.7 miles away); therefore, pinnipeds at haulouts are not expected to be affected from in-air pile driving noise.

The population of harbor seals in the South Bay is estimated at approximately 300. Specific movements of the seals are not well understood; however, based on marine mammal surveys, approximately half the population passes through the action area each day some of which may be younger animals given the proximity to the haul-outs. Assuming equal distribution of seal movement throughout the day, approximately 4

seals could pass through the area at any given hour (between zero and four seals have been sighted per hour at the northern East Span Bay Bridge project location). Pile driving is expected to last a maximum of two hours per day; therefore eight seals per day could be exposed to harassment level noise for approximately 4 months. Therefore, Caltrans is requesting the take, by Level B harassment only, 1,120 harbor seals.

Because there are no California sea lion haul-out sites in the South Bay, sea lions are expected to be incidental visitors to the area. Given the limited sightings in the South Bay and the distance to the nearest haul-out, Caltrans is requesting the take of 10 adult sea lions. Similarly, gray whales are rare in the southern portion of the Bay however they may be present resulting in Caltrans requesting authorization to harass two gray whales per year incidental to the proposed action.

Preliminary Determination

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that pile driving associated with the Dumbarton Bridge Seismic Retrofit Project will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from will have a negligible impact on the affected species or stocks. No subsistence hunting of marine mammals occur in the region; therefore, no impact on the availability of a species or stock for subsistence use would occur.

Endangered Species Act (ESA)

On January 12, 2009, NMFS received a request from the Federal Highway Administration (FHWA) to initiate consultation under section 7 of the ESA on Caltrans' proposed Dumbarton Bridge Seismic Retrofit Project as ESA-listed fish are present within the action area. NMFS issued a Biological Opinion (BiOp) on Caltran's Dumbarton Bridge Seismic Retrofit Project on August, 10, 2009. The BiOp concluded that the proposed activities were not likely to jeopardize the continued existence of Central California Coast steelhead Distinct Population Segment (DPS) or North American green sturgeon DPS and are not likely to adversely modify or destroy critical habitat for CCC steelhead DPS.

NMFS has determined that no ESA listed marine mammal species are likely to be affected by the proposed action as none are present within the action area; therefore, ESA consultation on issuance of the proposed IHA is not warranted.

National Environmental Policy Act (NEPA)

NOAA Administrative Order Series 216–6, May 20, 1999 (NAO), identifies issuance of IHAs as a type of Federal action that may be categorically excluded from preparation of an environmental assessment or environmental impact statement. In determining whether a categorical exclusion (CE) is appropriate for a given IHA, NMFS must consider: (1) factors listed in Section 5.05b of the NAO regarding prior analysis for the ''same'' action; (2) context and intensity of impacts, as defined in 40 CFR 1508.27; and (3) factors listed in Section 5.05c of the NAO regarding exceptions to CEs. NMFS has prepared, supplemented, or adopted numerous EAs leading to Findings of No Significant Impact (FONSIs) for pile driving activities similar to the proposed activity, including ones for Caltrans' projects which involved driving larger piles in the northern section of the Bay where pinniped and cetacean species are more abundant. Based on these previous NEPA analyses and the analysis contained within this notice, NMFS has determined that issuance of a one-year IHA to Caltrans for the taking, by Level B harassment only, incidental to the Dumbarton Bridge Seismic Retrofit project does not have the potential to result in any significant changes to the human environment. Therefore, the issuance of an IHA to Caltrans for the specified activity falls under the category of those actions which can be categorically excluded from the need to prepare an Environmental Assessment or Environmental Impact Statement.

Dated: November 19, 2009.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–28991 Filed 12–3–09; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds to the Procurement List a product and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* January 4, 2010.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or e-mail *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 9/11/2009 (74 FR 46748–46749) and 10/9/2009 (74 FR 52186), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to furnish a product and a service and impact of the additions on the current or most recent contractors, the Committee has determined that the product and service listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish a product and a service to the Government.

2. The action will result in authorizing small entities to furnish a product and a service to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with a product and a service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following product and service are added to the Procurement List:

Product

NSN: 3990–00–NSH–0076—Type E Pallet.

NPA: Goodwill Industries of South Texas, Inc., Corpus Christi, TX.
Contracting Activity: DEPT OF THE ARMY, XR W0MU USA DEPOT, CORPUS CHRISTI, TX.
Coverage: C-List for the requirements of the DEPT OF THE ARMY, XR W0MU USA DEPOT, CORPUS CHRISTI, TX.

Service

Service Type/Location: Custodial and Grounds Maintenance Services, Lewis R. Morgan FB–PO–CT, 18 Greenville Street, Newnan, GA.
NPA: WORKTEC, Jonesboro, GA.
Contracting Activity: GSA/Property Management Contracts, Public Buildings Service, Atlanta, GA.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. E9–28941 Filed 12–3–09; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List products to be provided by the nonprofit agency employing persons who are blind or have other severe disabilities.

Comments Must be Received on or Before: 1/4/2010.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed action.

Addition

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice for the products will be required to procure the products listed below from the nonprofit agency employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the products to the Government.

2. If approved, the action will result in authorizing small entities to provide the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products are proposed for addition to Procurement List for production by the nonprofit agency listed:

Products:

NSN: 7220–00–NIB–0382—36″x72″ Fingertip Mat, Heavy-duty, Black.
NSN: 7220–00–NIB–0372—4x6′ Vinyl Loop Scraper Mat, Gray.
NSN: 7220–00–NIB–0377—3x5′ Loop-twist Outdoor Scraper Mat, Gray.
NSN: 7220–00–NIB–0383—3x5′ Wiper/Scraper Mat, Medium Duty, Recycled PET, Gray.
NSN: 7220–00–NIB–0391—3x5′ Indoor Wiper Mat, Recycled PET, Gray.
NSN: 7220–00–NIB–0397—2x3′ Ribbed Vinyl Anti-fatigue mat, Gray.
NSN: 7220–00–NIB–0399—2x3′ Industrial deck-plate, Anti-fatigue Mat, Black.
Coverage: A–List for the total government requirement as aggregated by the General Administration Services Administration.
NSN: 7220–00–NIB–0398—3x5′ Ribbed Vinyl Anti-fatigue mat, Gray.
NSN: 7220–00–NIB–0400—3x5′ Industrial deck-plate, Anti-fatigue Mat, Black.
NSN: 7220–00–NIB–0402—2x3′ Industrial deck-plate, Anti-fatigue Mat, Black.
NSN: 7220–00–NIB–0403—3x5′ Industrial deck-plate, Anti-fatigue Mat, Black.
NSN: 7220–00–NIB–0411—2x3′ Anti-fatigue Mat, Recycled content, Gray.
NSN: 7220–00–NIB–0412—3x5′ Anti-fatigue Mat, Recycled content, Gray.
NSN: 7220–00–NIB–0384—4x6′ Wiper/Scraper Mat, Medium Duty, Recycled PET, Gray.
NSN: 7220–00–NIB–0378—4x6′ Loop-twist Outdoor Scraper Mat, Gray.
NSN: 7220–00–NIB–0392—4x6′ Indoor Wiper Mat, Recycled PET, Gray.
NSN: 7220–00–NIB–0369—3x5′ Vinyl Loop Scraper Mat, Black.
NSN: 7220–00–NIB–0370—4x6′ Vinyl Loop Scraper Mat, Black.
NSN: 7220–00–NIB–0375—24″x32″ Fingertip Mat, Medium-duty, Black.
NSN: 7220–00–NIB–0376—36″x72″ Fingertip Mat, Medium-duty, Black.
NSN: 7220–00–NIB–0381—23″x32″ Fingertip Mat, Heavy-duty, Black.
Coverage: B–List for the broad government requirement as aggregated by the General Administration Services Administration.
NPA: Wiscraft Inc.—Wisconsin Enterprises for the Blind, Milwaukee, WI.
Contracting Activity: Federal Acquisition Service, GSA/FAS Southwest Supply Center (QSDAC), Fort Worth, TX.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. E9–28942 Filed 12–3–09; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2009–OS–0177]

Privacy Act of 1974; Systems of Records

AGENCY: National Security Agency/Central Security Service, DoD.

ACTION: Notice to amend a systems of records.

SUMMARY: The National Security Agency (NSA) is proposing to amend a systems of records notices in its inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on January 4, 2010 unless comments are received which would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Anne Hill at (301) 688–6527.

SUPPLEMENTARY INFORMATION: The National Security Agency's systems of notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the records systems being amended are set forth below followed by the notices, as amended, published in their entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 1, 2009.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

GNSA 19

SYSTEM NAME:

NSA/CSS Child Development Services (May 15, 2002; 67 FR 34689).

CHANGES:

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''5 U.S.C. 301, Departmental Regulations; DoD Instruction 6060.2, Child Development Programs; and E.O. 9397 (SSN), as amended.''

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Contracting Officer's Representative for Children's World Learning Center, National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The NSA/CSS rules for contesting contents and appealing initial determinations are published at 32 CFR part 322 or may be obtained by written request addressed to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.''

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GNSA 19

SYSTEM NAME:

NSA/CSS Child Development Services.

SYSTEM LOCATION:

National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Children and their sponsors (NSA/CSS civilian employees, military assignees, non-appropriated fund instrumentality (NAFI) personnel, employees of other Federal agencies, and contractor employees); and individual day care providers at the NSA/CSS day care facility.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records kept on the child include: Enrollment information and attendance records; medical care authorizations; names of family members; preferred activities and foods; photos; emergency forms and release authorizations; child care information as reported by the sponsor; physical health information, including allergies; custody paperwork (if applicable); special needs instructions; progress and report cards; and incident reports of injuries.

Records kept on the sponsor include: Sponsor's name, grade or rank; Social Security Number; home and work addresses; home and work telephone numbers; contact information; employment affiliation (civilian, military, other, etc.); application identification number; photos; and comments/remarks related to the sponsor's status on the waiting list. Similar information is kept on other family members, as provided by the sponsor.

Records kept on day care providers and other contractors include: Name; home and work addresses; home, cellular, and work telephone numbers; e-mail addresses; citizenship; date and place of birth; Social Security Number; physical characteristics; military service records; previous employment/duty/volunteer experience; results of local and national security/police file checks; drug, alcohol use, and mental health information; and vendor employment application forms, which include references, automobile operator's and educational information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; DoD Instruction 6060.2, Child Development Programs; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To develop childcare programs that meet the needs of NSS/CSS employees and their families; provide child and family program eligibility and background information; record consent for access to emergency medical care and information. Information may also be used to verify health status of children, verify immunizations, note special program requirements, compliance with USDA food standards. Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'DoD Blanket Routine Uses' set forth at the beginning of the NSA/CSS' compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in paper files and on electronic mediums.

RETRIEVABILITY:

By parent or child's name, and Social Security Number (SSN).

SAFEGUARDS:

The NSA/CSS Fort Meade facility is secured by a series of guarded pedestrian gates and checkpoints. Access to the facility is limited to security cleared personnel and escorted visitors only. Within the facility itself, access to paper and computer printouts is controlled by limited-access facilities and lockable containers. Access to electronic mediums is controlled by computer password protection.

RETENTION AND DISPOSAL:

Disposition pending (until NARA has approved a retention and disposal schedule for these records, the records will be treated as permanent).

SYSTEM MANAGER(S) AND ADDRESS:

Contracting Officer's Representative for Children's World Learning Center, National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.

CONTESTING RECORD PROCEDURES:

The NSA/CSS rules for contesting contents and appealing initial determinations are published at 32 CFR part 322 or may be obtained by written request addressed to the National Security Agency/Central Security Service, Freedom of Information Act/ Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

RECORD SOURCE CATEGORIES:

Individuals themselves; parents or guardians of individuals enrolled in day care programs; NSA personnel; medical providers who have provided information about family members needing or receiving care; and contractor personnel and/or teachers.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–28978 Filed 12–3–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2009–OS–0178]

Privacy Act of 1974; System of Records

AGENCY: Defense Threat Reduction Agency, DoD.

ACTION: Notice to amend a system of records.

SUMMARY: The Defense Threat Reduction Agency proposes to amend a system of records notices in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on January 4, 2010 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Brenda Carter at (703) 767–1771.

SUPPLEMENTARY INFORMATION: The Defense Threat Reduction Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record systems being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 1, 2009.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

HDTRA 007

SYSTEM NAME:

Security Services (March 8, 2006; 71 FR 11593).

CHANGES:

* * * * *

Add the following two categories under the data element

''SYSTEM LOCATION'':

''CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All military and civilian personnel assigned to, or employed by Defense Threat Reduction Agency (DTRA); and all visitors to DTRA.''

''CATEGORIES OF RECORDS IN THE SYSTEM:

Name; Social Security Number (SSN); date and place of birth; height; weight; hair and eye color; citizenship; grade/rank, service; organization, security clearance; date of clearance; date of investigation; type of investigation; Agency that conducted investigation; basis special accesses; courier authorization; continuous access roster expiration date; badge number; vehicle ID and decal number; special intelligence access; expiration date, agency, billet number; list of badges/passes issued; safes and open storage locations/custodians; conference title/duties/location; special access/briefings; visit requests; conference rosters; clearance and special access rosters; picture identification; and correspondence concerning adjudication/passing of clearances/accesses.''

* * * * *

HDTRA 007

SYSTEM NAME:

Security Services.

SYSTEM LOCATION(S):

Primary location: Security and Counterintelligence Directorate, Defense Threat Reduction Agency, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

Secondary locations: Albuquerque Operations, Defense Threat Reduction Agency, 1680 Texas Street, SE., Kirtland Air Force Base, Albuquerque, NM 87117–5669.

Security and Counterintelligence Field Detachment Travis, Defense Threat Reduction Agency, 510 Hickman Avenue, Travis Air Force Base, CA 94535.

Security and Counterintelligence Detachment, Europe, Unit 29623, Box 0034, APO, AE 09096–0034; Physical Address: Nathan Hale Depot, GEB 4107, Scheppalle 95, 64295 Darmstadt, Germany.

Categories of individuals covered by the system:

All military and civilian personnel assigned to, or employed by Defense Threat Reduction Agency (DTRA); and all visitors to DTRA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name; Social Security Number (SSN); date and place of birth; height; weight; hair and eye color; citizenship; grade/rank, service; organization, security clearance; date of clearance; date of investigation; type of investigation; Agency that conducted investigation; basis special accesses; courier authorization; continuous access roster expiration date; badge number; vehicle ID and decal number; special intelligence access; expiration date, agency, billet number; list of badges/passes issued; safes and open storage locations/custodians; conference title/duties/location; special access/briefings; visit requests; conference rosters; clearance and special access rosters; picture identification; and correspondence concerning adjudication/passing of clearances/accesses.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; E.O. 10450, Security Requirements for Government Employment; E.O. 12065, National Security Information; The Internal Security Act of 1950 (Pub. L. 831), Section 21, as amended and codified at 50 U.S.C. 797; The Atomic Energy Act of 1954, Section 145; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

For use by officials and employees of the Defense Threat Reduction Agency in the performance of their official duties related to determining the eligibility of individuals for access to classified information, access to buildings and facilities, or to conferences over which DTRA has security responsibility. Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To officials and employees of Government contractors and other Government agencies in the performance of their official duties related to the screening and selection of individuals for security clearances and/or special authorizations, access to facilities or attendance at conferences.

The 'Blanket Routine Uses' published at the beginning of DTRA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media and paper records.

RETRIEVABILITY:

By individual's last name and Social Security Number (SSN).

SAFEGUARDS:

The computer facility and terminals are located in restricted areas accessible only to authorized personnel. Manual records and computer printouts are available only to authorized persons with an official need to know. Buildings are protected by security forces and an electronic security system.

RETENTION AND DISPOSAL:

Computer records on individuals are moved to historical area of database files upon termination of an individual's affiliation with DTRA; personnel security files are retained for two years at which point the Classified Information Non disclosure Agreement form (SF 312) is mailed to the National Archives Repository and all other information is destroyed. Manual records or conference attendees, visitors, and visit certifications to other agencies are maintained for two years and destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Security and Counterintelligence Directorate, Defense Threat Reduction Agency, 8725 John J. Kingman Drive, Ft. Belvoir, VA 22060–6201.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Chief, Security and Counterintelligence Directorate, Defense Threat Reduction Agency, 8725 John J. Kingman Drive, Ft. Belvoir, VA 22060–6201.

Written requests for information should contain the full name, home address, Social Security Number (SSN), date and place of birth.

For personal visits, the individual must be able to provide identification showing full name, date and place of birth, and their Social Security Number (SSN).

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the Chief, Security and Counterintelligence Directorate, Defense Threat Reduction Agency, 8725 John J. Kingman Drive, Ft. Belvoir, VA 22060–6201.

Written requests for information should contain the full name, home address, Social Security Number (SSN), date and place of birth.

For personal visits, the individual must be able to provide identification showing full name, date and place of birth, and their Social Security Number (SSN).

CONTESTING RECORD PROCEDURES:

The DTRA rules for accessing records and for contesting contents and appealing initial agency determinations are published in DTRA Instruction 5400.11B; 32 CFR part 318; or may be obtained from the Chief, Security and Counterintelligence Directorate, Defense Threat Reduction Agency, 8725 John J. Kingman Drive, Ft. Belvoir, VA 22060–6201.

RECORD SOURCE CATEGORIES:

Information is extracted from military and civilian personnel records, investigative files, and voluntarily submitted by the individual. Other Government agencies, law enforcement officials and contractors may provide the same data.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

An exemption rule for this system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 318.

[FR Doc. E9–28979 Filed 12–3–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the State of Alaska's Proposed Alaska Stand Alone Pipeline (ASAP) Natural Gas Transportation Pipeline

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of Intent.

SUMMARY: The Alaska District, U.S. Army Corps of Engineers (Corps) intends to prepare a Draft Environmental Impact Statement (DEIS) to identify and analyze the potential impacts associated with the construction of the proposed Alaska Stand Alone Pipeline (ASAP) natural gas transportation pipeline. The Corps is the lead federal agency and the Bureau of Land Management (BLM), National Park Service (NPS) and Environmental Protection Agency (EPA) are participating as cooperating agencies in the DEIS development process. The Environmental Impact Statement (EIS) will be used as a basis for the Corps permit decision and to ensure compliance with the National Environmental Policy Act (NEPA). The Corps will be evaluating a permit application for work under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. Because ASAP would require decisions and actions by other federal agencies (such as right-of-way grants and other permits), this DEIS will also fulfill the NEPA responsibilities of those federal agencies.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and the DEIS can be answered by: Ms. Serena Sweet, Regulatory Division, telephone: (907) 753–2819, toll free in AK: (800) 478–2712, fax: (907) 753–5567, e-mail: *serena.e.sweet@usace.army.mil,* or mail: U.S. Army Corps of Engineers, CEPOA–RD, Post Office Box 6898, Elmendorf AFB, Alaska 99506–0898. Additional information may be obtained at *http://www.asapeis.com.*

SUPPLEMENTARY INFORMATION:

1. The permit applicant, the State of Alaska, is proposing to construct a 24-inch diameter, high-pressure pipeline from Alaska's North Slope to Cook Inlet to transport North Slope natural gas to in-state Alaska markets. The pipeline would be located entirely within the State of Alaska. Gas off-take would be provided for the Fairbanks Area and in other locations along the route. The Alaska Stand Alone Pipeline project includes a Gas Conditioning Plant on the North Slope prior to the pipeline inlet, compressor stations along the pipeline, and natural gas liquid (NGL) extraction facilities to produce utility-grade natural gas. The gas reserves in the Prudhoe Bay field are some of the largest on the North Slope and represent the most likely sources of gas for the pipeline system.

2. *Alternatives:* Two routing options are being considered to bring the gas from the North Slope to Alaska consumers. These two options follow routings from Prudhoe Bay to Cook Inlet via the Parks Highway and the Richardson Highway. Both route options share the same starting point at Prudhoe Bay and ending point (at Mile Post 55 of the Beluga Pipeline) as well as a common routing from Prudhoe Bay to the Livengood area. In addition, two spur line options and two pre-build options, using a proposed Alaska-Canada Gasline as the transport to the takeoff points will be included in this analysis.

a. *Stand Alone Alternative Routes:*

i. Parks Highway Stand Alone—from Prudhoe Bay to Livengood, then to Cook Inlet generally following the Parks Highway; includes service to Fairbanks.

ii. Richardson Highway Stand Alone—from Prudhoe Bay to Livengood, to Fairbanks, then generally following the Trans Alaska Pipeline alignment to Delta Junction, to north of Glennallen via the Richardson Highway, then to Cook Inlet via the Glenn Highway; includes service to Glennallen.

b. *Spur Alternative Routes:*

i. Parks Highway Spur—from Fairbanks to Cook Inlet generally following the Parks Highway.

ii. Richardson Highway Spur—from Delta Junction to north of Glennallen via the Richardson Highway, then to Cook Inlet via the Glenn Highway; includes service to Glennallen.

c. *Pre-Build Alternative Routes:*

i. Parks Highway Pre-Build—from Cook Inlet to Fairbanks generally following the Parks Highway.

ii. Richardson Highway Pre-Build—from Cook Inlet via the Glenn Highway to north of Glennallen then to Delta Junction via the Richardson Highway, then generally following the Trans Alaska Pipeline alignment to Fairbanks (with a smaller diameter pipeline).

d. *Gas Source Alternatives:*

i. *Prudhoe Bay Gas Source:* Natural gas from the Prudhoe Bay gas fields would require treatment at a gas treatment plant that would likely be located at Prudhoe Bay. From Prudhoe Bay the gas pipeline would generally follow the existing Trans Alaska Pipeline System (TAPS) corridor across the North Slope and enter the Brooks Range near Galbraith Lake.

ii. *Gubik Gas Source:* The Gubik Gas Field is located 19 miles east of Umiat and approximately 70 miles west of TAPS Pump Station #2. The pipeline from the Gubik Field would parallel a proposed road alignment to the east, crossing the Anaktuvuk River, and proceeding southeast to the Itkillik River. The route would then parallel the Itkillik River to the east side of Itigaknit Mountain then south to connect with the TAPS Corridor near Toolik Lake. The exact location of the Gubik production facilities has not been selected. The length of the Gubik Pipeline route to the TAPS corridor is estimated to be about 90 miles.

3. *Scoping Process:* The scoping period will begin on December 7, 2009, and end on February 5, 2010.

a. The Corps invites full public participation to promote open communication on the issues surrounding the proposal. All federal, state, Tribal, local agencies, and other persons or organizations that have an interest are urged to participate in the NEPA scoping process. Scoping meetings will be held to receive public input on the proposed purpose and need of the project, to identify significant issues and to discuss proposed alternatives. The scoping process will help to further explain the purpose and need plus the alternatives to be reviewed in the DEIS.

b. The scoping meetings are tentatively planned for the dates and locations listed at *http://www.asapeis.com* (please consult website for any changes and additional information including the scoping summary). The Corps expects to hold scoping meetings in Anchorage, Barrow, Delta Junction, Fairbanks, Glennallen, McKinley Park, Nenana, and Wasilla.

4. The lands along the proposed pipeline corridor and one or more of its alternatives are owned by numerous entities; including, federal and state governments, the State of Alaska, and private land holders. These federal land managers include the BLM, NPS and the Department of Defense. Private landholders include Native corporations, Native allottees, and land owned by other private individuals.

5. The DEIS will analyze the potential social, economic, and environmental impacts to the affected areas. The following major issues will be analyzed in depth in the DEIS: the natural gas delivery system construction and operation and its affect upon the surrounding communities; essential fish

habitat; threatened and endangered species including critical habitat; cultural resources; socioeconomics; and secondary and cumulative impacts.

6. It is anticipated that the DEIS will be available August 2010 for public review.

Dated: November 23, 2009.

Serena E. Sweet,

Project Manager, Alaska District, U.S. Army Corps of Engineers.

[FR Doc. E9–28865 Filed 12–3–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the Proposed Point Thomson Project To Develop the Thomson Sand Reservoir by Extracting Gas Condensate and Oil for the Purpose of Commercial Production as Proposed by the Exxon Mobil Corporation (ExxonMobil)

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of Intent.

SUMMARY: The Alaska District, U.S. Army Corps of Engineers (Corps) intends to prepare a Draft Environmental Impact Statement (DEIS) to identify and analyze the potential impacts associated with the development of the Thomson Sand Reservoir, including construction and operation of the proposed project. The Corps will be evaluating a permit application for work under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. The Environmental Impact Statement (EIS) will be used as a basis for the permit decision and to ensure compliance with the National Environmental Policy Act.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and the DEIS can be answered by: Ms. Julie McKim, Regulatory Division, telephone: (907) 753–2773, toll free in AK: (800) 478–2712, Fax: (907) 753–5567, e-mail: *julie.w.mckim@usace.army.mil,* mail: U.S. Army Corps of Engineers, CEPOA–RD, Post Office Box 6898, Elmendorf AFB, Alaska 99506–0898. Additional information may be obtained at *http://www.pointthomsonprojecteis.com.*

SUPPLEMENTARY INFORMATION:

1. *Background Information:* The Environmental Protection Agency (EPA) previously issued a notice of intent to prepare a DEIS on April 19, 2002 for a similar proposal to develop oil and gas reserves in or near the Point Thomson Unit, potentially including designation of ocean dredged material disposal site(s). The EPA was the lead Federal Agency because the proposed project would have required authorization under Section 102 of the Marine Protection, Research, and Sanctuaries Act (MPRSA), with the Corps as a Cooperating Agency. Per the applicant's request, the agreement to pursue the EIS was terminated between the EPA and the applicant, Exxon Mobil Corporation (ExxonMobil). In October 2009, ExxonMobil submitted a new proposed project that would not be subject to Section 102 of the MPRSA but would require authorization from the Corps under Section 10 of the Rivers Harbors Act of 1899 and Section 404 of the Clean Water Act. Therefore, the Corps has been designated the lead Federal agency for the revised proposed project.

2. The permit applicant, ExxonMobil, is proposing to develop the Thomson Sand Reservoir located approximately 60 miles east of Deadhorse on the Beaufort Sea coast, in the State of Alaska. A minimum of five wells would be drilled from three pads: a Central Pad, and East and West Pads located to access the eastern and western extent of the reservoir. The applicant would produce gas from the reservoir to recover liquid condensate from natural gas and re-inject the residual gas back into the reservoir, conserving it for future use. Hydrocarbon liquid condenses from the produced natural gas when pressure and temperature are lowered below original reservoir conditions during production at surface processing facilities. ExxonMobil proposes to develop offshore portions of the reservoir using long reach directional drilling techniques from the onshore pads. The produced hydrocarbon liquids (condensate and oil) would be shipped through a new 22-mile long, elevated pipeline from Point Thomson to the existing Badami Development. This pipeline would then tie into the existing Badami common carrier pipeline, which connects with the existing common carrier oil sales pipeline system to the Trans-Alaska Pipeline System Pump Station No. 1. The Central Pad would also include infrastructure to support operations and drilling, such as temporary construction and permanent camps; offices, warehouses, and shops; electric power generating and distribution facilities; diesel fuel, water, and chemical storage; treatment systems for drinking water and wastewater; a grind and inject module; waste management facilities; and communications facilities. Other project facilities, in addition to the drilling pads, would include a gravel airstrip, a bulkhead and dolphins, in-field gravel roads, ice roads, in-field pipelines, and a gravel mine. Dredging may be required at the bulkhead.

3. *Alternatives:* Reasonable alternatives will be identified and evaluated throughout the Scoping and EIS process.

4. *Scoping:* The scoping period will begin on January 11, 2010 and end on February 25, 2010.

a. The Corps invites full public participation to promote open communication on the issues surrounding the proposal. All Federal, State, Tribal, local agencies, and other persons or organizations that have an interest are urged to participate in the NEPA scoping process. Meetings will be held to receive public input on the proposed purpose and need of the project, to identify significant issues and to discuss proposed alternatives. The scoping process will help to further explain the purpose and need plus the alternatives to be reviewed in the DEIS.

b. The DEIS will analyze the potential social, economic, physical, and biological impacts to the affected areas. The following major issues will be analyzed in depth in the DEIS: threatened and endangered species including critical habitat; hydrology and wetlands; fish and wildlife; the construction and operation of the facilities and their effect upon the surrounding communities; cultural resources; socioeconomics; alternatives; secondary and cumulative impacts.

c. The Corps will serve as the lead Federal agency in the preparation of the DEIS. The Environmental Protection Agency, United States Fish and Wildlife Service, and State of Alaska Department of Natural Resources are participating as cooperating agencies.

5. The Corps expects to hold scoping meetings in Anchorage, Barrow, Fairbanks, Kaktovik, and Nuiqsut. Further information about these meetings will be published locally, on the project Web site *http://www.pointthomsonprojecteis.com,* or can be obtained by contacting the Corps as described above. A description of the proposed project will be posted on the project Web site prior to these meetings to help the public focus their scoping comments.

6. It is anticipated that the DEIS will be available November 2010 for public review.

Dated: November 23, 2009.

Approved by:

Julie W. McKim,

Project Manager, Alaska District, U.S. Army Corps of Engineers.

[FR Doc. E9–28864 Filed 12–3–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2009–0061]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to amend a system of records.

SUMMARY: The Department of the Air Force is proposing to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on January 4, 2010 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Swilley at 703–696–6172.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record systems being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 1, 2009.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F036 USAFA I

SYSTEM NAME:

Cadet History Data Base (May 7, 1999; 64 FR 24611)

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''Chief, Institutional Research Division, Headquarters, United States Air Force Academy, (HQ USAFA/XPN), 2304 Cadet Drive, Suite 3800, United States Air Force Academy, CO 80840–5002.''

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Individual's full name, Social Security Number (SSN), high school, college and USAF career information. Including active duty, reserve, and National Guard military performance, academic performance, certain medical, disciplinary and personal facts, historical admissions data, attrition data, test data from interest/personality profiles, and names of cadets whose parents are VIPs.''

* * * * *

STORAGE:

Delete entry and replace with ''Electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''By Social Security Number (SSN) and individual's name.''

SAFEGUARDS:

Delete entry and replace with ''Records are accessed by individual(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software, passwords and file server permissions.''

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Chief, Institutional Research Division, Headquarters, United States Air Force Academy (HQ USAFA/XPN), 2304 Cadet Drive, Suite 3800, United States Air Force Academy, CO 80840–5002.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether this system of records contains information on themselves should address inquiries to the Chief, Institutional Research Division, Headquarters, United States Air Force Academy (HQ USAFA/XPN), 2304 Cadet Drive, Suite 3800, United States Air Force Academy, CO 80840–5002.

Requests should contain the individual's full name and Social Security Number (SSN).''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking to access records about themselves contained in this system should address requests to the Chief, Institutional Research Division, Headquarters, United States Air Force Academy (HQ USAFA/XPN), 2304 Cadet Drive, Suite 3800, United States Air Force Academy, CO 80840–5002.

Requests should contain the individual's full name and Social Security Number (SSN).''

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Information obtained from educational institutions, medical institutions, automated system interfaces, Cadet Administrative Management Information System (CAMIS) database, Association of Graduates, and source documents (such as reports).

* * * * *

F036 USAFA I

SYSTEM NAME:

Cadet History Data Base

SYSTEM LOCATION:

Chief, Institutional Research Division, Headquarters, United States Air Force Academy, (HQ USAFA/XPN), 2304 Cadet Drive, Suite 3800, United States Air Force Academy, CO 80840–5002.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former USAF Academy cadets.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's full name, Social Security Number (SSN), high school, college and USAF career information. Including active duty, reserve, and National Guard military performance, academic performance, certain medical, disciplinary and personal facts, historical admissions data, attrition

data, test data from interest/personality profiles, and names of cadets whose parents are VIPs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 9331, Establishment; Superintendent; faculty; and E.O. 9397 (SSN) as amended.

PURPOSE(S):

Used by USAF Academy faculty and staff in conducting studies and analysis relating to attitudes, retention, graduate professional performance, and career pattern.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Information may be furnished to congressional nominating source for the purpose of enhancing the nomination selection process.

The Association of Graduates may receive information to foster graduates' fellowship and professional development, as well as promote institutional development.

The 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of record system notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

By Social Security Number (SSN) and individual's name.

SAFEGUARDS:

Records are accessed by individual(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets. Those in computer storage devices are protected by computer system software, passwords and file server permissions.

RETENTION AND DISPOSAL:

Records are retained until superseded, obsolete, no longer needed for reference, or upon inactivation. Records are destroyed by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by erasing, deleting, overwriting or degaussing.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Institutional Research Division, Headquarters, United States Air Force Academy (HQ USAFA/XPN), 2304 Cadet Drive, Suite 3800, United States Air Force Academy, CO 80840–5002.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information on themselves should address inquiries to the Chief, Institutional Research Division, Headquarters, United States Air Force Academy (HQ USAFA/XPN), 2304 Cadet Drive, Suite 3800, United States Air Force Academy, CO 80840–5002.

Requests should contain the individual's full name and Social Security Number (SSN).

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system should address requests to the Chief, Institutional Research Division, Headquarters, United States Air Force Academy (HQ USAFA/XPN), 2304 Cadet Drive, Suite 3800, United States Air Force Academy, CO 80840–5002.

Requests should contain the individual's full name and Social Security Number (SSN).

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33–332; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information obtained from educational institutions, medical institutions, automated system interfaces, Cadet Administrative Management Information System (CAMIS) database, Association of Graduates, and source documents (such as reports).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–28980 Filed 12–3–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 4, 2010.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, *Attention:* Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or send e-mail to *oira_submission@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: December 1, 2009.

James Hyler,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: Extension.

Title: Annual Performance Report for Partnership and State Projects for Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP).

Frequency: Annually.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 209.
Burden Hours: 8,360.

Abstract: The Annual Performance Report for Partnership and State Projects for Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) is a required report that grant recipients must submit annually. The purpose of this information collection is for accountability. The data is used to report on progress in meeting the performance objectives of GEAR UP, program implementation, and student outcomes. The data collected includes budget data on Federal funds and match contributions, demographic data, and data regarding services provided to students.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4117. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–28983 Filed 12–3–09; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Emergency Management for Higher Education Grant Program

AGENCY: Office of Safe and Drug-Free Schools, Department of Education.

ACTION: Notice of proposed priorities and requirements.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.184T.

SUMMARY: The Assistant Deputy Secretary for Safe and Drug-Free Schools proposes priorities and requirements for the Emergency Management for Higher Education (EMHE) grant program. The Assistant Deputy Secretary may use one or more of these priorities and requirements for competitions in fiscal year (FY) 2010 and later years. Congress appropriated initial funding for the EMHE grant competition in FY 2008 following the tragic shooting at Virginia Polytechnic Institute and State University in 2007. That and other past emergencies, such as the events of September 11, 2001, Hurricanes Katrina and Rita, and the tragic shooting at Northern Illinois University, reinforce the need for colleges and universities to prepare for the full range of emergency events that may affect their campus communities. The EMHE grant program provides funds to institutions of higher education (IHEs) to establish or enhance an emergency management planning process that integrates the various components and departments of each IHE; focuses on reviewing, strengthening, and institutionalizing all-hazards emergency management plans; fosters partnerships with local and State community partners; supports vulnerability assessments; encourages training and drilling on the emergency management plan across the campus community; and requires IHEs to develop a written plan for preventing violence on campus by assessing and addressing the mental health needs of students, faculty, and staff who may be at risk of causing campus violence by harming themselves or others.

The Assistant Deputy Secretary intends to use these proposed priorities and requirements to provide Federal financial assistance to IHEs to develop, or review or improve, and fully integrate, their campus-based all-hazards emergency management planning efforts. We intend to grant awards under these proposed priorities and requirements to increase the capacity of IHEs to prevent/mitigate, prepare for, respond to, and recover from the full range of emergency events.

DATES: We must receive your comments on or before January 4, 2010.

ADDRESSES: Address all comments about this notice to Tara Hill, U.S. Department of Education, 400 Maryland Avenue, SW., room 10088, PCP, Washington, DC 20202–6450.

If you prefer to send your comments by e-mail, use the following address: *tara.hill@ed.gov.* You must include the term ''FY 2010 EMHE NPP Comments'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Tara Hill. Telephone: (202) 245–7860 or by e-mail: *tara.hill@ed.gov.* If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Invitation To Comment: We invite you to submit comments regarding this notice. To ensure that your comments have maximum effect in developing the notice of final priorities and requirements, we urge you to identify clearly the specific proposed priority or requirement that each comment addresses.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed priorities and requirements. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about this notice in room 10088, 550 12th Street, SW., Washington, DC between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Purpose of Program: EMHE grants support efforts by IHEs to develop, or review and improve, and fully integrate, campus-based all-hazards emergency management planning efforts within the framework of the four phases of emergency management (Prevention-Mitigation, Preparedness, Response, and Recovery).

Program Authority: 20 U.S.C. 7131.

Applicable Program Regulations: 34 CFR part 299.

Proposed Priorities

This notice contains two proposed priorities.

Proposed Priority 1—IHE Projects Designed to Develop, or Review and Improve, and Fully Integrate Campus-Based All-Hazards Emergency Management Planning Efforts

Background: In the report language accompanying the 2008 Department of Education Appropriations Act, Congress indicated that funding recommended for school emergency preparedness activities be used for new grant awards

to institutions of higher education to develop and implement emergency management plans for preventing campus violence (including assessing and addressing the mental health needs of students) and for responding to threats and incidents of violence or natural disaster in a manner that ensures the safety of the campus community. Accordingly, the EMHE grant program was first administered in FY 2008 based on a priority similar to proposed priority 1 in this notice. A subsequent cohort of EMHE grants was awarded from the FY 2008 EMHE grant competition slate using FY 2009 EMHE funds. Our experience with EMHE grantees from these two cohorts is that developing all-hazards emergency management plans based on the four phases of emergency management (prevention-mitigation, preparedness, response and recovery) is a critical activity for campuses across the Nation. We propose this priority at this time to enable additional campuses to focus on reviewing, developing, and strengthening their emergency management efforts.

Proposed Priority: Under this proposed priority, we support IHE projects designed to develop, or review and improve, and fully integrate campus-based all-hazards emergency management planning efforts. A program funded under this proposed priority must use the framework of the four phases of emergency management (Prevention-Mitigation, Preparedness, Response, and Recovery) to:

(1) Develop, or review and improve, and fully integrate a campus-wide all-hazards emergency management plan that takes into account threats that may be unique to the campus;

(2) Train campus staff, faculty, and students in emergency management procedures;

(3) Coordinate with local and State government emergency management efforts;

(4) Ensure coordination of planning and communication across all relevant components, offices, and departments of the campus;

(5) Develop a written plan with emergency protocols that include the medical, mental health, communication, mobility, and emergency needs of persons with disabilities, as well as for those individuals with temporary special needs or other unique needs (including those arising from language barriers or cultural differences);

(6) Develop or update a written plan that prepares the campus for infectious disease outbreaks with both short-term implications for planning (*e.g.,* outbreaks caused by methicillin-resistant *Staphylococcus aureus* (MRSA) or food-borne illnesses) and long-term implications for planning (*e.g.,* pandemic influenza); and

(7) Develop or enhance a written plan for preventing violence on campus by assessing and addressing the mental health needs of students, staff, and faculty who may be at risk of causing violence by harming themselves or others.

Proposed Priority 2—Priority for Applicants that Have Not Previously Received a Grant under the EMHE Program (CFDA 84.184T)

Background: Ensuring that IHEs are attempting to prevent or mitigate, prepare for, respond to, and recover from emergency situations that may arise from multiple hazards, including natural and man-made, is an issue of national importance. Since FY 2008, 43 projects have received funding under the EMHE grant program. These projects represent a very small number of the colleges and universities in the United States today. To address the emergency management planning needs of IHEs that have not previously received funding under this program, we propose a priority for IHEs that have not yet received a grant under this program.

By establishing this priority, we hope to ensure that EMHE grant funds have a positive impact on a larger number of college students, faculty, and staff, and that the funds are made available to assist campuses that have not previously received services under an EMHE grant.

Proposed Priority: Under this proposed priority we give priority to applications from IHEs that have not previously received a grant under this program (CFDA 84.184T). An applicant that has received services under this program directly, or as a partner in a consortium application under this program, would not meet this priority. Under a consortium application, all members of the IHE consortium would have to meet this criterion to meet this proposed priority.

Types of Priorities: When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Proposed Requirements

Background: The EMHE program is intended to support colleges and universities seeking to develop, or review and improve, and fully integrate their campus-based all-hazards emergency management planning efforts. College campuses often consist of many distinct departments and offices serving such a significant number of students, staff, and faculty; they can often resemble small cities. For a campus to prevent or mitigate, prepare for, respond to, and recover from any emergency, an IHE needs to ensure that all of the diverse and relevant components of its campus or campuses are coordinated, communicating with one another, training together, and using an integrated all-hazards emergency management plan. It is essential that the written IHE emergency management plan take into account any unique hazards, vulnerabilities, or threats that may face the campus.

Further, our experience has shown that for an IHE to be prepared to respond effectively to an emergency, its planning efforts must be closely coordinated with local government and with local and State emergency management planning efforts. Ensuring that key first responders in the community, under the jurisdiction of the local government, have met and trained with key campus responders is critical to a successful response effort. Therefore, IHEs must establish and maintain partnerships with other key community partners within the locality and State in which the IHE is based. Particularly as our Nation faces the H1N1 pandemic, it is apparent that close communication with local and State public health partners is essential to timely response and service provision.

In addition, as recent events on college campuses have shown, identifying community-based mental health providers and maintaining ongoing relationships with those agencies is essential for IHE students and staff who may need additional

mental health assistance if a major event were to occur. While many IHEs have access to general health and mental health services on their own campuses, in the event of a large-scale emergency, history shows that almost all IHEs will still need assistance from off-campus support.

Finally, our experience has shown that in many cases, college campuses are expected to serve as points of distribution (PODS) for medical supplies and services, or as shelter or evacuation locations, for the community in the case of major disasters. However, we recognize that not all IHEs have had the opportunity to develop these relationships with each of the key external community partners or agencies.

IHE emergency management plans should be based on the most current emergency management practices as established by the National Incident Management System (NIMS). In accordance with Homeland Security Presidential Directive/HSPD–5, the NIMS provides a consistent approach for Federal, State, and local governments to work effectively and efficiently together to prepare for, prevent, respond to, and recover from domestic incidents, regardless of cause, size, or complexity. Ensuring that public agencies at all levels of government, including IHEs, are implementing common emergency management principles, terminology, and organizational processes is critical to an effective and efficient response to an emergency.

Proposed Requirements: The Assistant Deputy Secretary proposes the following requirements for this program. We may apply one or more of these requirements in any year in which this program is in effect.

Partner Agreements: To be considered for a grant award, an applicant must include in its application two partner agreements. One partner agreement must detail coordination with, and participation of, a representative of the appropriate level of local or State government for the locality in which the IHE to be served by the project is located (for example, the mayor, city manager, or county executive). The second partner agreement must detail coordination with, and participation of, a representative from a local or State emergency management coordinating body (for example, the head of the local emergency planning council that would be involved in coordinating a large-scale emergency response effort in the campus community). Both agreements must include the name of the partner organization, an indication of whether the partner represents the local or State government or the local or State emergency management coordinating body, and a description of the respective partner as well as a description of the partner's roles and responsibilities in supporting the EMHE grant and in strengthening emergency management planning efforts for the IHE. Each partner agreement must also include a description of the roles and responsibilities of the IHE in grant implementation and partner coordination. A signature from an authorized representative of the IHE and each of the two required partners acknowledging the relationship and the agreements must be included in the application. If either or both of the two required partners is not present in an applicant's community, or cannot feasibly participate, the agreements must explain the absence of each missing partner.

Applications that fail to include either of the two required partner agreement forms, including information on partners' roles and responsibilities (or an explanation documenting that partner's absence in the community), will not be considered for funding.

Each consortium applicant (an applicant submitting on behalf of multiple IHEs) and any applicant applying on behalf of multiple campuses (including one or more satellite or extension campuses within its own institution or its consortium of IHEs) must submit a complete set of partner agreements with appropriate signatures from the authorized representative and the two required partners noted earlier for each campus proposed to be receiving services under its EMHE project.

Although this program requires partnerships with other parties, administrative direction and fiscal control for the project must remain with the IHE.

Completed Memoranda of Agreements: All IHEs supported by the EMHE program must use the grant period to create, or review and update, and sign, a memorandum of agreement (MOA) with each of the following four partners: local or State emergency management coordinating body, local government, primary off-campus public health provider, and primary off-campus mental health services provider. Each applicant under the EMHE program must include an assurance with its application that the IHE will establish these MOAs during the project period. MOAs must be completed for each campus to be served by the EMHE project. Completed MOAs will be requested at the end of the project period with the Final Report submission.

Coordination with State or Local Homeland Security Plan: All emergency management plans created or enhanced using funding under this program must be coordinated with the Homeland Security Plan of the State or locality in which the IHE is located. To ensure that emergency services are coordinated, and to avoid duplication of effort within States and localities, an applicant must include in its application an assurance that the IHE will coordinate with, and follow, the requirements of its State or local Homeland Security Plan for emergency services and initiatives.

Implementation of the National Incident Management System (NIMS): Each applicant must agree to implement its grant in a manner consistent with the implementation of the NIMS in its community. An applicant must include in its application an assurance that it has met, or will complete, all current NIMS requirements by the end of the grant period.

Implementation of the NIMS is a dynamic process that will continue to evolve over time. In order to receive Federal preparedness funding under the EMHE program, each IHE must cooperate with the efforts of its community to meet the minimum NIMS requirements established for each fiscal year. Because DHS' determination of NIMS requirements may change from year to year, an applicant must refer to the most recent list of NIMS requirements published by DHS when submitting its application. In any notice inviting applications, the Department will provide applicants with information necessary to access the most recent DHS list of NIMS requirements.

Note: The responsibilities and procedures of any campus-based security office or law enforcement agency and the elements of the campus emergency management plan must be considered in conjunction with the local community's emergency operations plan (EOP) and the capacity and responsibility of local fire and rescue departments, emergency medical service providers, crisis center/hotlines, and law enforcement agencies that may be called to assist the IHE in a large-scale disaster. IHEs' participation in the NIMS preparedness program of the local government is essential in ensuring that first-responder services are delivered in a timely and effective manner. Additional information about NIMS and NIMS implementation is available at *http://www.fema.gov/emergency/nims/ImplementationGuidanceStakeholders.shtm* and *http://www.fema.gov/emergency/nims/index.shtm.*

IHEs that have previously received Federal preparedness funding and are,

therefore, already NIMS-compliant should indicate that in the assurance form.

Eligibility: To be considered for an award under this competition, an applicant must be considered an IHE. An IHE, for the purposes of this competition, is defined as: an educational institution in any State that—

(1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate or persons who meet the requirements of section 484(d)(3) of the Higher Education Act of 1965, as amended;

(2) Is legally authorized within such State to provide a program of education beyond secondary education;

(3) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association or, if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

Final Priorities and Requirements: We will announce the final priorities and requirements in a notice in the **Federal Register**. We will determine the final priorities and requirements after considering responses to this notice and other information available to the Department. This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use one or more of these priorities and requirements, we invite applications through a notice in the **Federal Register.**

Executive Order 12866: This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this proposed regulatory action.

The potential costs associated with this proposed regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this proposed regulatory action, we have determined that the benefits of the proposed priorities and requirements justify the costs.

We have determined, also, that this proposed regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

Discussion of Costs and Benefits: The potential costs associated with the proposed priorities and requirements are minimal while the potential benefits are significant.

Grantees may anticipate costs in developing and/or disseminating written emergency management plans, implementing the NIMS requirements, and conducting training and drills of the improved emergency management plans. Grantees may also anticipate costs in achieving increased cross-campus collaboration and partnering with local and State community partners. Finally, grantees will experience costs when traveling to required grant administration training events sponsored by the Department. However, these costs may be included in the grant budget and, therefore, will have little or no financial impact on the applicant.

The benefit of the proposed priorities and requirements is that grantees will develop a comprehensive, all-hazards, campus-based, NIMS-compliant emergency management plan based on the four phases of emergency management. Training provided for staff and students will increase the IHE's overall preparedness efforts. Developing written plans for assessing and addressing the mental health needs of students and staff who may be at risk of causing harm to themselves or others on campus could help to prevent future tragedies on campuses. In addition, by having written plans designed to address infectious diseases with both short- and long-term impacts for the campus and the community, IHEs may be able to mitigate the adverse effects of these hazards, which in turn could result in significant savings in health care and other financial costs for the community. In summary, completing a comprehensive emergency management planning effort in advance of an emergency will allow IHEs to prepare to respond and recover from any type of emergency that may occur. An ultimate goal of the EMHE program is to decrease the resulting costs to IHEs in terms of lost resources, facilities, time, and causalities that may result from an actual emergency.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to this Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: December 1, 2009.

Kevin Jennings,

Assistant Deputy Secretary for Safe and Drug-Free Schools.

[FR Doc. E9–28994 Filed 12–3–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC09–912–001]

Commission Information Collection Activities (FERC–912); Comment Request; Submitted for OMB Review

November 25, 2009.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the

Paperwork Reduction Act of 1995, 44 USC 3507, the Federal Energy Regulatory Commission (Commission or FERC) has submitted the information collection described below to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received no comments in response to the **Federal Register** notice (74FR 47567, 9/16/2009) and has made this notation in its submission to OMB.

DATES: Comments on the collection of information are due by January 4, 2010.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *oira_submission@omb.eop.gov* and include OMB Control Number 1902–0237 as a point of reference. The Desk Officer may be reached by telephone at 202–395–4638. A copy of the comments should also be sent to the Federal Energy Regulatory Commission and should refer to Docket No. IC09–912–001. Comments may be filed either electronically or in paper format. Those persons filing electronically do not need to make a paper filing. Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help/submission-guide.asp*. To file the document electronically, access the Commission's Web site and click on Documents & Filing, E–Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

For paper filings, an original and 2 copies of the comments should be submitted to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426, and should refer to Docket No. IC09–912–001.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the ''eLibrary'' link. For user assistance, contact *ferconlinesupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by telephone at (202) 502–8663, by fax at (202) 273–0873, and by e-mail at *ellen.brown@ferc.gov*.

SUPPLEMENTARY INFORMATION: FERC–912 (''Cogeneration and Small Power Production, PURPA Section 210(m) Regulations for Termination or Reinstatement of Obligation to Purchase or Sell,'' OMB Control No. 1902–0237) [1] covers the reporting requirements in 18 CFR Part 292.

On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005)) was signed into law. Section 1253(a) of EPAct 2005 amends section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) by adding subsection (m), that provides for the termination and reinstatement of an electric utility's obligation to purchase and sell energy and capacity. The implementing regulations in 18 CFR Part 292 (18 CFR 292.309–292.313) provide procedures for:

- An electric utility to file an application for the termination of its obligation to purchase energy from a Qualifying Facility (QF) (18 CFR 292.310);
- an affected entity or person to apply to the Commission for an order reinstating the electric utility's obligation to purchase energy from a QF (18 CFR 292.311);
- an electric utility to file an application for the termination of its obligation to sell energy and capacity to QFs (18 CFR 292.312);
- an affected entity or person to apply to the Commission for an order reinstating the electric utility's obligation to sell energy and capacity to QFs (18 CFR 292.313).

ACTION: The Commission is requesting a three-year extension of the current expiration date for the FERC–912, with no changes to the reporting requirements.

Burden Statement: The public reporting burden for this collection is estimated to be as follows:

FERC–912	Annual number of respondents	Average number of reponses per respondent	Average burden hours per response	Total annual burden hours
	(1)	(2)	(3)	(1)×(2)×(3)
Termination of obligation to purchase in § 292.310	4	1	12	48
Reinstatement of obligation to purchase in § 292.311	1	1	13	13
Termination of obligation to sell in § 292.312	1	1	12	12
Reinstatement of obligation to sell in § 292.313	1	1	13	13
Totals	.....	.....	.....	86

[1] During its history, ''FERC–912'' has been known by various 'names' and OMB control numbers. Originally, FERC had wanted to include FERC–912 requirements in the FERC–556 'umbrella' of requirements. Because FERC–556 (''Cogeneration and Small Power Production;'' OMB Control No. 1902–0075) was pending OMB review of another rulemaking (in Docket No. RM05–36–000) prior to the issuance of the Notice of Proposed Rulemaking (NOPR) in RM06–10, the Commission used a temporary identifier of ''FERC–912''.

''FERC–912'' was originally assigned the OMB Control No. 1902–0219 at the NOPR stage. However, prior to issuance of the final rule in Docket RM06–10, OMB Control No. 1902–0219 was eliminated from OMB's inventory.

FERC–556 (OMB Control No. 1902–0075) was then approved in RM05–36, so FERC used the ''FERC–912(556)'' identifier in the Final Rule in RM06–10. The Commission planned to transfer the hours associated with ''FERC–912(556)'' in RM06–10 to FERC–556. Page two of the OMB approval (dated 2/23/2007) for ICR Reference Number 200611–1902–003 listed OMB Control No. 1902–0237 as FERC–556.

Currently FERC–556 (OMB Control No. 1902–0075) is pending OMB review, so this collection is being called ''FERC–912'' and is being submitted separately. FERC–556 is not a subject of this Notice.

The total estimated annual cost burden to respondents is $5,304.58 [(86 hours/2,080 hours [2] per year) × $128,297 [3] per year].

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28919 Filed 12–3–09; 8:45 am]

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[2] Number of hours an employee works each year.

[3] Estimated mean annual salary of a lawyer.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13509–000]

Turnagain Arm Tidal Energy Corporation; Notice of Amended Preliminary Permit Application Accepted for Filing, and Soliciting Comments, Motions To Intervene, and Competing Applications

November 25, 2009.

On August 31, 2009, Little Susitna Construction Company, Inc., filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Turnagain Arm Tidal Electric Generation Project (Turnagain Arm Project or project), located on the Turnagain Arm of Cook Inlet and adjacent lands of the Kenai Peninsula Borough and the Municipality of Anchorage, Alaska. On September 3, 2009, the Commission issued a Notice of Acceptance of the August 31, 2009 application and sent an acceptance letter to Little Susitna Construction Company, Inc. Subsequently, on November 17, 2009, Little Susitna Construction Company, Inc. amended its preliminary permit application to change its name to Turnagain Arm Tidal Energy Corporation.

Pursuant to 18 CFR 4.35, the September 3, 2009 Notice of Application and acceptance letter are rescinded, and the acceptance date for the application is now November 17, 2009.

The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) Proposed 8-mile-long and 7.5-mile long tidal ''fences'' containing a total of 220 10-megawatt (MW) Davis Turbine tidal-to-electrical energy generating units (total installed capacity equal to 2,200 MW)—the 8-mile-long tidal fence would extend from just south of Fire Island to Kenai Peninsula Borough land at Possession Point and the 7.5-mile-long tidal fence would extend from a point about 5–7 miles south of Fire Island to a point offshore of Anchorage; (2) two proposed control buildings—one near the southwest end of the 8-mile-long tidal fence at Possession Point (Possession Point control building) and one in Anchorage along Raspberry Road (Anchorage control building)—containing equipment for controlling the turbines and the interties of the transmission lines to existing area electrical grids; (3) a pair of proposed 44-mile-long, 230-kilovolt (kV) transmission lines extending southwest from the Possession Point control building to a Homer Electric substation near the unincorporated community of Nikiski; (4) a proposed single, 17-mile-long, 230-kV above and below water transmission line extending from the Possession Point control building, across the 8-mile-long tidal fence, and to the Anchorage control building; (5) a pair of proposed 10-mile-long, 230-kV transmission lines extending from the Anchorage control building to a Chugach Electric substation in Anchorage; (6) a proposed 18-mile-long, 230-kV above and below water transmission line extending from the Possession Point control building, over the 7.5-mile-long tidal fence, and to the Anchorage control building; and (7) appurtenant facilities. The proposed project would have an estimated average annual generation of 11,560,000 megawatt-hours.

Applicant Contact: Dominic S.F. Lee, P.E., or Tamara L. Smith; Turnagain Arm Tidal Energy Corporation; 821 N St., Suite 201, Anchorage, AK 99501; Ph. (907) 274–7571.

FERC Contact: Nick Jayjack, 202–502–6073.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings, please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13509) in the docket number field to

access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28920 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2211–004]

Duke Energy Indiana, Inc.; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

November 25, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2211–004.

c. *Date filed:* April 24, 2009.

d. *Applicant:* Duke Energy Indiana, Inc.

e. *Name of Project:* Markland Hydroelectric Project.

f. *Location:* On the Ohio River in Switzerland County, Indiana, near the towns of Florence and Vevay, Indiana, and Warsaw, Kentucky. The project affects about 6.21 acres of federal lands administered by the U.S. Army Corps of Engineers.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Tamara Styer, Duke Energy, *Mail Code:* EC12Y, P.O. Box 1006, Charlotte, NC 28201–1006, (704) 382–0293 or *tami.styer@duke-energy.com.*

i. *FERC Contact:* Dianne Rodman, (202) 502–6077 or *dianne.rodman@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.'' For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov*; call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted, and is ready for environmental analysis at this time.

l. The existing Markland Hydroelectric Project consists of a powerhouse integrated into the north end of the U.S. Army Corps of Engineers' (Corps) Markland dam, which was constructed by the Corps between 1959 and 1964. The project has a total installed capacity of 64.8 megawatts (MW) and produces an average annual generation of 350,454 megawatt-hours. All generated power is utilized within the applicant's electric utility system. The project operates in run-of-river mode, has no storage, and only uses flows released by the Corps.

The project consists of the following facilities: (1) A 96-foot-high, 248-foot-wide intake structure, with steel trashrack panels installed along the east side, directing flows to the connected powerhouse; (2) a powerhouse, integral to the Corps' Markland dam, containing three vertical shaft Kaplan turbine/generator units with a total installed capacity of 64.8 MW; (3) a tailrace discharging flows immediately downstream of the dam; (4) a substation about 250 feet north of the powerhouse; (5) an approximately 750-foot-long existing access road; (6) a 9.37-mile-long, 138-kilovolt transmission line in a 100-foot-wide right-of-way extending to Fairview, Indiana; and (7) appurtenant facilities. The applicant is proposing to add a new, approximately 300-foot-long access road, leading to a new parking area for recreation use at the tailrace of the dam.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) bear in all capital letters the title ''COMMENTS'', ''REPLY COMMENTS'', ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28922 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–146–013]

Independent Energy Producers Association v. California Independent System Operator Corporation; Notice of Compliance Filing

November 25, 2009.

Take notice that on November 23, 2009, Williams Gas Marketing, Inc. (Williams) filed a compliance refund report and interest calculation reflecting

the amount refunded, with interest, by Williams to the California Independent System Operator Corporation for June 1, 2006 to February 13, 2007 refund period, pursuant to the Commission's order issued on August 18, 2009, 128 FERC ¶ 61,165 (2009) (Order on Remand).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 14, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28917 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2351–015]

Public Service Company of Colorado; Notice of Availability of Final Environmental Assessment

November 25, 2009.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47879), the Commission has reviewed a request to conduct emergency repairs to project facilities under Part 12 of the Federal Power Act at the Cabin Creek Pumped Storage Project, FERC Project No. 2351. The licensee seeks Commission approval to conduct emergency repairs to roadways within the project boundary. The Environmental Assessment (EA) analyzes the environmental impacts of the proposed roadway repairs and concludes that approval of the request, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment. The project is located on Cabin Creek and South Clear Creek in Clear Creek County, Colorado.

The EA was written by staff in the Office of Energy Projects, Federal Energy Regulatory Commission (Commission). A copy of the EA is on file with the Commission and is available for public inspections. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3372, or for TTY, (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28914 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1864–003]

Upper Peninsula Power Company; Notice of Intent To Prepare an Environmental Document and Soliciting Comments

November 25, 2009.

Take notice that the following material addressing required dam safety measures has been filed with the Commission and is available for public inspection:

a. *Filing:* Environmental report to support replacement of the spillway at the Bond Falls Development which is being required under Part 12 of the Commission's regulations.

b. *Project No:* 1864–003.

c. *Date Filed:* August 21, 2009, and supplemented on November 17, 2009.

d. *Licensee:* Upper Peninsula Power Company.

e. *Name of Project:* Bond Falls Hydroelectric Project.

f. *Location:* The Bond Falls Hydroelectric Project is located on the Ontonagon River in Ontonagon and Gogebic Counties, Michigan, and Vilas county, Wisconsin, partially on lands within the Ottawa National Forest. The Bond Falls Development is located on the Middle Branch of the Ontonagon River in Ontonagon County, Michigan, and occupies 73.5 acres of land within the Ottawa National Forest.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Licensee Contact:* Rick Moser, Upper Peninsula Power Company, 700 North Adams Street, P.O. Box 19001, Green Bay, WI 54307–9001, (920) 433–2290.

i. *FERC Contact:* Rachel Price, (202) 502–8907, and e-mail: *rachel.price@ferc.gov.*

j. *Deadline for filing comments:* December 28, 2009.

All documents should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments may be filed electronically via the Internet, *see* 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site under the ''e-filing'' link. The Commission strongly encourages electronic filings. In lieu of electronic filing, an original and eight copies of all documents may be mailed to the Secretary at the address above.

k. *Description of material:* Upper Peninsula Power Company has filed an Environmental Report in support of its plan to replace the spillway at the Bond

Falls Development, part of the Bond Falls Hydroelectric Project (FERC No. 1864). The project consists of four separate developments: Bond Falls, Bergland, Cicso, and Victoria. The proposed work at the Bond Falls spillway would take place within the Bond Falls Development which is on the Middle Branch of the Ontonagon River. The Bond Falls reservoir is operated to store water and divert river flow from the Middle Branch to the South Branch of the Ontonagon River. A recent hydraulic study determined that the existing spillway capacity is inadequate to pass the flows associated with the calculated Probable Maximum Flood (PMF) for the project location. To ensure the licensee's compliance with FERC engineering guidelines and safety regulations, modifications to the spillway are necessary. The licensee plans to replace the existing spillway with a new spillway incorporating two larger tainter gates at a lower sill elevation. In addition, the licensee plans to replace the existing low level outlet with a new low level structure incorporated into the new spillway, and raise the embankment crest in low areas of the main, auxiliary, and control dams of the Bond Falls Development. In order to complete construction, the licensee plans to drawdown the reservoir to an elevation of 1455.8 feet North American Vertical Datum of 1988, and maintain the reservoir at that elevation during all of 2010. In addition the spillway replacement construction activities will result in the temporary closure of some of the project's recreational facilities during 2010.

The Commission intends to prepare an environmental document under the National Environmental Policy Act (NEPA) for the planned Bond Falls spillway replacement. The NEPA document will be used by the Commission to identify environmental impacts and to identify measures that would help mitigate the impacts caused by the activities associated with the spillway replacement.

l. *Locations of the Filing:* A copy of the filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments:* Anyone may submit comments on the material described in this notice. In completing its environmental review, the Commission will consider all comments filed. Any comments must be received on or before deadline for filing comments specified above.

o. Any filing made with the Commission in response to this notice must bear in all capital letters the title ''COMMENTS'' and the *Project Number:* P–1864–003.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the material described in this notice. A copy of the filing may be obtained by agencies directly from the licensee. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the licensee's representatives.

q. Comments may be filed electronically via the Internet in lieu of paper. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28921 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC10–9–000]

MidAmerican Energy Company; Notice of Filing

November 25, 2009.

Take notice that on October 27, 2009, MidAmerican Energy Company (MidAmerican) submitted a request for approval of proposed journal entries required to reclassify, for accounting purposes, certain limited assets and the related accumulated depreciation, from the distribution plant accounts to the transmission plant accounts.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 15, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28915 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–1612–002]

New York Independent System Operator, Inc.; Notice of Filing November 25, 2009

Take notice that on November 24, 2009, the New York Independent System Operator, Inc., pursuant to Rule 212 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.212 (2009), filed a motion to defer effective date of previously accepted tariff revisions, from October 20, 2009 until November 12, 2009, and request for waivers.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of

the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,*using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 4, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28918 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC10–18–000]

Excel Pipeline LLC; Notice of Filing

November 25, 2009.

Take notice that on November 20, 2009, Excel Pipeline LLC submitted a request for the waiver of the requirement to file the third quarter FERC Form No. 6–Q from September 11, 2009 through September 30, 2009.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: November 25, 2009.

Kimberly Bose,

Secretary.

[FR Doc. E9–28923 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD10–2–000]

Guidance on Simultaneous Transmission Import Limit Studies; Notice of Technical Conference

November 25, 2009.

Take notice that Commission staff will convene a technical conference in the above-referenced proceeding on Wednesday, December 16, 2009 at 9 a.m. (Eastern Standard Time) in the Commission Meeting Room at the Commission's Washington, DC headquarters, 888 First Street, NE., Washington, DC 20426.

On November 19, 2009, in *Carolina Power & Light Company*, 129 FERC ¶ 61,152 (2009) (November 19 Order), the Commission directed Commission staff to convene a technical conference to provide guidance for performing Simultaneous Transmission Import Limit (SIL) studies. As described in the November 19 Order, among other things, the topics to be discussed at the technical conference may include development of seasonal benchmark cases, completeness of SIL study support data files (monitor, contingency, and subsystem files), scaling methodologies, identification of energy transfer limits, transfer distribution factors, OASIS practices, methods to identify available uncommitted generation, application of net area interchange, and alternative methods to adjust net area interchange for a study area with two non-contiguous first-tier areas.

The December 16, 2009 technical conference will focus on how a SIL study should be conducted and is intended to provide guidance to the industry so that prospective SIL studies will produce more consistent results.

The technical conference is open to all interested persons. Interested persons planning on attending the technical conference are strongly encouraged to submit in writing any questions that they would like addressed during the technical conference. Questions should be submitted to both *alfred.corbett@ferc.gov* and *david.hunger@ferc.gov* by Monday, December 7, 2009 and include ''AD10–2–000 Questions'' in the subject line.

Any person planning to attend the technical conference is strongly encouraged to register by close of business on Monday, December 7, 2009. Registration may be submitted either online at *https://www.ferc.gov/whats-new/registration/tech-conf-12–16–09-form.asp* or by faxing a copy of the form (found at the referenced online link) to 202–208–0353.

For further information, please contact Alfred Corbett at (202) 502–8454 or e-mail *alfred.corbett@ferc.gov*.

A free Web cast of the technical conference will be available. Registration to view the Web cast is not required. Web cast viewers will not be permitted to participate during the technical conference. Anyone with Internet access interested in viewing this conference can do so by navigating to *http://www.ferc.gov*'s Calendar of Events and locating the appropriate event in the Calendar. The events will contain a link to the applicable Web cast option. The Capitol Connection provides technical support for the Web casts and offers the option of listening to the conferences via phone-bridge for a fee. If you have any questions, visit

http://www.CapitolConnection.org or call 703–993–3100.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free (866) 208–3372 (voice) or (202) 502–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–28916 Filed 12–3–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0264; FRL–9088–7]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Notice of Supplemental Distribution of a Registered Pesticide Product; EPA ICR No. 0278.10, OMB Control No. 2070–0044

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before January 4, 2010.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OPP–2009–0264, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by mail to: EPA Docket Center, Environmental Protection Agency, Office of Pesticide Programs (OPP), Regulatory Public Docket (7502P), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Lily Negash, Field and External Affairs Division, (7506P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–347–8515; fax number: 703–305–5884; e-mail address: *negash.lily@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On June 24, 2009 (74 FR 30073), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OPP–2009–0264, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: Notice of Supplemental Distribution of a Registered Pesticide Product.

ICR numbers: EPA ICR No. 0278.10, OMB Control No. 2070–0044.

ICR Status: This ICR is scheduled to expire on March 31, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable.

Abstract: This information collection activity provides the Environmental Protection Agency (EPA) with notification of supplemental registration of distributors of pesticide products. EPA is responsible for the regulation of pesticides as mandated by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended. Section 3(e) of FIFRA (see 7 U.S.C. 136a(e)), allows pesticide registrants to distribute or sell a registered pesticide product under a different name instead of or in addition to his own. Such distribution and sale is termed ''supplemental distribution'' and the product is termed a ''distributor product.'' EPA requires the pesticide registrant to submit a supplemental statement (EPA Form 8570–5, *Notice of Supplemental Distribution of a Registered Pesticide Product*) when the registrant has entered into an agreement with a second company that will distribute the registrant's product under the second company's name and product name. Responses to this collection of information are mandatory.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average about 15 minutes per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Individuals or firms engaged in activities related to the registration and supplemental distribution of a pesticide product.

Estimated Number of Respondents: 1,895.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 455.

Estimated Total Annual Cost: $36,952, includes $0 annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 140 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is an adjustment due to the decrease in the number of applications the Agency expects to receive in the next 3 years. EPA expects to receive a projected 584 fewer annual responses, based on a year-over-year decrease in the number of responses received in the 2006–2008 fiscal years. The Agency estimates that it will receive an average of 1,895 supplemental registrations annually for the next three years.

Dated: November 23, 2009.

John Moses, Director,

Collection Strategies Division.

[FR Doc. E9–28973 Filed 12–3–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8986–3]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7146 or *http://www.epa.gov/compliance/nepa/*.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated July 17, 2009 (74 FR 34754).

Draft EISs

EIS No. 20080434, ERP No. D–FTA–G53011–TX, Southwest-to-Northeast Rail Corridor Project, Transportation Improvements in the Cities of Fort Worth, Haltom City, North Richland Hills, Colleyville, and Grapevine, Funding and U.S. Army COE Section 404 Permit, Tarrant County, TX.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090249, ERP No. D–NOA–E91028–00, Amendment 3 to the 2006 Consolidated Atlantic Highly Migratory Species (HMS), Fishery Management Plan, To Implement Management Measures that Prevent Overfishing and Rebuild Overfished Stocks, Implementation.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090270, ERP No. D–NRC–A09837–00, GENERIC—License Renewal of Nuclear Plants (NUREG–1437), Volumes 1 and 2, Revision 1, To Improve the Efficiency of the License Renewal Process, Implementation.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090285, ERP No. D–NPS–K70010–CA, Warner Valley Comprehensive Site Plan, Addressing Natural and Cultural Resource Conflicts, Parking and Circulation Improvements in Warner Valley, Implementation, Lassen Volcanic National Park, Plumas County, CA.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090323, ERP No. D–FHW–K40190–NV, I–15 Corridor Improvement and Local Arterial Improvements Project, Collectively Known as Project NEON, To Improve the Safety and Travel Efficiency in the I–15 Corridor, City of Las Vegas, Clark County, NV.

Summary: EPA expressed environmental concerns about environmental justice impacts related to relocation, air quality, and noise issues. Rating EC2.

EIS No. 20090325, ERP No. D–NHT–A86245–00, Corporate Average Fuel Economy (CAFE) Standards Passenger Car and Light Trucks Model Years 2012–2016, To Reduce National Energy Consumption by Increasing the Fuel Economy of Passenger Car and Light Trucks sold in the United States, Implementation.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20090346, ERP No. D–TVA–E65085–00, Northeastern Tributary Reservoirs Land Management Plan, Implementation, Beaver Creek, Clear Creek, Boone, Fort Patrick Henry, South Holston, Watauga, and Wilbur Reservoirs, Carter, Johnson, Sullivan, and Washington Counties, TN and Washington County, VA.

Summary: EPA expressed environmental concerns about direct and indirect watershed impacts. Rating EC2.

Final EISs

EIS No. 20090353, ERP No. F–AFS–F65076–WI, Northwest Sands Restoration Project, Restoring the Pine Barren Ecosystem, Implementation, Washburn District Ranger, Chequamegon-Nicolet National Forest, Bayfield County, WI.

Summary: EPA's previous request for clarification about open barrens was addressed; therefore, EPA does not object to the proposed action.

EIS No. 20090356, ERP No. F–AFS–F65075–MN, Border Project, Proposing Forest Vegetation Management and Related Transportation System Activities, LaCroix Ranger District, Superior National Forest, St. Louis County, MN.

Summary: EPA does not object to the proposed project.

EIS No. 20090364, ERP No. F–NPS–J65519–SD, Wind Cave National Park Project, Elk General Management Plan, Implementation, Custer County, SD.

Summary: No formal comment letter was sent to the preparing agency.

Dated: December 1, 2009.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E9–28965 Filed 12–3–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8986–2]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/*.

Weekly receipt of Environmental Impact Statements

Filed 11/23/2009 Through 11/27/2009 Pursuant to 40 CFR 1506.9.

EIS No. 20090406, Final EIS, USFS, CA, Modoc National Forest Motorized Travel Management Plan, Implementation, National Forest Transportation System (NFTS), Modoc, Lassen and Siskiyou Counties, CA, Wait Period Ends: 01/04/2010, Contact: Kathleen Borovac 530–233–8754.

EIS No. 20090407, Draft EIS, NOAA, 00, Rationalization of the Pacific Coast Groundfish Limited Entry Trawl Fishery, Amendment 20, Implementation, WA, OR and CA, Comment Period Ends: 01/19/2010, Contact: Barry A. Thom 206–526–6150.

EIS No. 20090408, Draft EIS, USFS, CO, Rio de los Pinos Vegetation Management Project, Proposes to Salvage Engelmann Spruce Trees that have been killed by, or are Infested with, Spruce Beetle, Conejos Peak

Ranger District, Rio Grande National Forest, Conejos, Rio Grande and Archuleta Counties, CO, Comment Period Ends: 01/19/2010, Contact: Jack Lewis 719–274–8971.

EIS No. 20090409, Final EIS, FHWA, CA, Partially Revised Tier 1—Placer Parkway Corridor Preservation Project, Select and Preserve a Corridor for the Future Construction from CA–70/99 to CA 65, Placer and Sutter Counties, CA, Wait Period Ends: 01/04/2010, Contact: Gary Sweeten 916–498–5128.

EIS No. 20090410, Draft Supplemental EIS, BR, CA, Mormon Island Auxiliary Dam Modification Project, Addressing Hydrologic, Seismic, Static, and Flood Management Issues, Sacramento and El Dorado Counties, CA, Comment Period Ends: 01/19/2010, Contact: Matthew See 916–989–7198.

EIS No. 20090411, Draft EIS, BLM, CA, Clear Creek Management Area Resource Management Plan (RMP), Implementation, Portion of San Benito County and Fresno County, CA, Comment Period Ends: 03/03/2010, Contact: Sandra McGinnis 916–985–4474.

EIS No. 20090412, Final EIS, USFS, CA, Stanislaus National Forest Motorized Travel Management (17305) Plan, Implementation, Stanislaus National Forest, CA, Wait Period Ends: 01/19/2010, Contact: Sue Warren 209–532–3671 Ext. 321.

Amended Notices

EIS No. 20090343, Draft EIS, USFS, OR, Deschutes and Ochoco National Forest and the Crooked River National Grassland Travel Management Project, Implementation, Deschutes, Jefferson, Crook, Klamath, Lake, Grant and Wheeler County, OR, Comment Period Ends: 12/08/2009, Contact: Mollie Chaudet 541–383–5517.

Revision of FR Notice Published 10/09/2009: Extending Comment Period from 11/23/2009 to 12/08/2009.

Dated: December 1, 2009.

Robert W. Hargrove,

Director, NEPA Compliance Division,

Office of Federal Activities.

[FR Doc. E9–28966 Filed 12–3–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTON AGENCY

[EPA–HQ–OW–2009–0761; FRL–9088–1]

Executive Order 13508 Chesapeake Bay Protection and Restoration Section 202 Federal Agency Reports

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice and Request for Public Comments.

SUMMARY: This notice announces the availability of seven final reports by federal agencies for restoration and protection of the Chesapeake Bay and requests public comment. The reports were prepared pursuant to Executive Order (E.O.) 13508 of May 12, 2009, Chesapeake Bay Protection and Restoration. This E.O. requires that a draft strategy be published for public review and comments together with the final reports prepared by the federal agencies. The draft strategy was made available on November 9, 2008 for comment.

DATES: Comments on the seven Section 202 reports must be submitted on or before January 8, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2009–0761, by one of the following methods:

- *http://www.regulations.gov:* After entering the docket for this action, click on one of the seven agency reports, for which you want to make comment. Once you arrive at the page for the specific report on which you wish to comment, click the ''Submit a Comment'' button at the top right of the web page, then follow the on-line instructions.
- Mail: Water Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave, NW., Washington, DC 20460.
- Hand Delivery: EPA Docket Center Public Reading Room, EPA Headquarters West, Room 3340, 1301 Constitution Avenue, NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m.), and special arrangements should be made for deliveries of boxed information by contacting the Docket Center at 202–566–1744.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2009–0761. This Notice is not open for public comment, but, the Section 202 reports are available for comment on *http://www.regulations.gov.* The Section 203 draft strategy was made available in the **Federal Register** on November 9, 2009 and is also available in the docket for comment. Additional information about the docket is contained below.

FOR FURTHER INFORMATION CONTACT: Marguerite Duffy, USEPA, Region 3, Chesapeake Bay Program Office, Annapolis City Marina, 410 Severn Avenue, Suite 109 (3CB10), Annapolis, MD 21403; telephone number: (410) 267–5764; fax number (410) 267–5777; email: *duffy.marguerite@epa.gov.*

SUPPLEMENTARY INFORMATION:

Why Were These Documents Prepared?

Executive Order 13508, Chesapeake Bay Protection and Restoration, dated May 12, 2009 (74 FR 23099, May 15, 2009), requires a Federal Leadership Committee composed of seven federal agencies to prepare and publish a set of reports and a draft strategy for public review and comment within 180 days of the date of the order. The deadline for publication of the draft strategy was November 9, 2009 and accordingly is published in the **Federal Register** for a 60 day comment period. The federal agency draft reports required by E.O. 13508 Sections 202(a) through (g) were submitted to the Federal Leadership Committee for the Chesapeake Bay on September 9, 2009 and released to the public on September 10, 2009. The September 9, 2009, draft reports were reviewed by the Federal Leadership Committee for the Chesapeake Bay, in consultation with relevant state agencies. The revised Section 202 reports reflect consideration of the comments received during state consultation and preliminary public input. During the next six months, review and incorporation of comments will continue as appropriate.

How Can I Access the Docket and/or Submit Comments?

Docket: EPA has established a public docket for this Notice under Docket ID No. EPA–HQ–OW–2009–0761. The E.O. 13508 Section 202 reports are available in the docket at *http://www.regulations.gov,* as well as at *http://executiveorder.chesapeakebay.net.* Assistance and tips for accessing the docket can be found at *http://executiveorder.chesapeakebay.net.* The seven Section 202 reports are included as separate documents within docket number EPA–HQ–OW–2009–0761. Comments via email are not being accepted. Instead, comments will be accepted through *http://www.regulations.gov* and by mail. If you are commenting on the Section 202 reports, note that there are seven Section 202 reports within the docket

and you must submit comments to the specific Section 202 report, on which you are commenting. If you are mailing comments to the docket on one or more reports, clearly identify the specific 202 report(s) and page number at which each comment is directed. All comments received, including any personal information provided, will be included in the public docket without change and will be made available online at www.regulations.gov, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information, the disclosure of which is restricted by statute.

Do not submit information to *http://www.regulations.gov* that you consider to be CBI or otherwise protected. It is recommended that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If your comment cannot be read due to technical difficulties and we are unable to contact you for clarification, we will not consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* Publicly available docket materials are available electronically either at *http://www.regulations.gov* as well as at the EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The telephone number for this docket is 202–566–2426. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744. Certain material, such as copyrighted materials, will be publicly available only in hard copy at the Docket Center.

Why Is EPA Posting These Reports and Draft Strategy for Public Comment?

Executive Order 13508 requires the Federal Leadership Committee for the Chesapeake Bay to prepare and publish a set of reports and a coordinated strategy for protecting and restoring the Chesapeake Bay. As required by E.O. 13508 Section 202, lead agencies prepared reports focusing on:

(a) Defining the next generation of tools and actions to restore water quality in the Chesapeake Bay and describing the changes to be made to regulations, programs, and policies to implement these actions;

(b) targeting resources to better protect the Chesapeake Bay and its tributary waters;

(c) strengthening storm water management practices at Federal facilities and on Federal lands within the Chesapeake Bay watershed and developing storm water best practices guidance;

(d) assessing the impacts of a changing climate on the Chesapeake Bay and developing a strategy for adapting natural resources programs and public infrastructure to the impacts of a changing climate on water quality and living resources of the Chesapeake Bay watershed;

(e) expanding public access to waters and open spaces of the Chesapeake Bay and its tributaries from Federal lands and conserving landscapes and ecosystems of the Chesapeake Bay watershed;

(f) strengthening scientific support for decision making to restore the Chesapeake Bay and watershed, including expanded environmental research; and

(g) developing focused and coordinated habitat and research activities that protect and restore living resources and water quality of the Chesapeake Bay and its watershed. E.O. 13508 Section 203 requires the Federal Leadership Committee for the Chesapeake Bay to prepare and publish a strategy for coordinated implementation of existing programs and projects to guide efforts to protect and restore the Chesapeake Bay. The strategy should to the extent permitted by law:

(a) Define environmental goals for the Chesapeake Bay and describe milestones for making progress toward attainment of these goals;

(b) Identify key measureable indicators of environmental condition and changes that are critical to effective Federal leadership;

(c) Describe the specific programs and strategies to be implemented, including the programs and strategies described in draft reports developed under Section 202 of the order;

(d) Identify the mechanisms that will assure that governmental and other activities, including data collection and distribution, are coordinated and effective, relying on existing mechanisms where appropriate; and

(e) Describe a process for the implementation of adaptive management principles, including a periodic evaluation of protection and restoration.

Acknowledging the strong public interest in the future of the Chesapeake Bay and the actions being taken to improve conditions in the Bay and its watershed, the Federal Leadership Committee for the Chesapeake Bay looks forward to receiving comments on these documents.

What Are the Next Steps in the Process for Collecting Public Comment?

The agencies will review public comments on the draft strategy and agency reports. The comments will be taken into consideration as the Federal Leadership Committee for the Chesapeake Bay develops the final Section 203 strategy. However, the Committee does not anticipate revising the Section 202 reports based upon public comments received. The Committee plans to use comments received on the Section 202 reports to help inform the development of the Section 203 final strategy. As such, reviewers should focus their comments on the draft 203 strategy. A response to comments document will be released at the same time as the final E.O. 13508 Section 203 strategy with anticipated release by May 12, 2010. The federal agencies plan to hold a series of stakeholder meetings throughout the Chesapeake Bay watershed to discuss the draft strategy. The details of these meetings will be announced at: *http://executiveorder.chesapeakebay.net.*

Dated: November 25, 2009.

Peter S. Silva,

Assistant Administrator, Office of Water.

[FR Doc. E9–28974 Filed 12–3–09; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

SUMMARY: The Advisory Committee was established by Public Law 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

TIME AND PLACE: Wednesday, December 16, 2009 from 9:30 a.m. to 12 p.m. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

AGENDA: Agenda items include a briefing of the Advisory Committee members on challenges for 2010, their roles and responsibilities and an ethics briefing.

PUBLIC PARTICIPATION: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If you plan to attend, a photo ID must be presented at the guard's desk as part of the clearance process into the building, and you may contact Susan Houser to be placed on an attendee list. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to December 5, 2009, Susan Houser, Room 1273, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3232 or TDD (202) 565–3377.

FURTHER INFORMATION: For further information, contact Susan Houser, Room 1273, 811 Vermont Ave., NW., Washington, DC 20571, (202) 565–3232.

Jonathan Cordone,

Senior Vice President and General Counsel.

[FR Doc. E9–28959 Filed 12–3–09; 8:45 am]

BILLING CODE 6690–01–M

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Sunshine Act; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on December 10, 2009, from 9 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Roland E. Smith, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

- November 12, 2009.

B. New Business

- Effective Interest Rates–12 CFR Part 617–Final Rule.
- Farmer Mac Risk-Based Capital Stress Test, Version 4.0– 12 CFR Part 652–Proposed Rule.

Closed Session*

- Office of Secondary Market Oversight Quarterly Report.

* Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

Dated: December 2, 2009.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. E9–29111 Filed 12–2–09; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *http://www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 28, 2009.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Bank Applications Officer) 33 Liberty Street, New York, New York 10045–0001:

1. First Niagara Financial Group, Inc., Buffalo, New York; to become a bank holding company by acquiring 100 percent of the voting shares of The Harleysville National Bank and Trust Company, and Harleysville National Corporation, both of Harleysville, Pennsylvania.

Board of Governors of the Federal Reserve System, December 1, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–28976 Filed 12–3–09; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request for Public Comment: 60-Day Proposed Information Collection: Indian Health Service Medical Staff Credentials and Privileges Files

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: The Indian Health Service (IHS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the IHS is providing a 60-day advance opportunity for public comment on a proposed new collection of information to be submitted to the Office of Management and Budget for review.

Proposed Collection: Title: 0917–0009, ''Indian Health Service Medical Staff Credentials and Privileges Files.'' *Type of Information Collection Request:* Extension, without revision, of currently approved information collection, 0917–0009, ''Indian Health Service Medical Staff Credentials and Privileges Files'' agreement. *Form Numbers(s):* None. *Need and Use of Information Collection:* This collection of information is used to evaluate individual health care providers applying for medical staff privileges at IHS health care facilities.

The Health and Human Services operates health care facilities that provide health care services to American Indians and Alaska Natives. To provide these services, the IHS employs (directly and under contract) several categories of health care providers including: Physicians (M.D. and D.O.), dentists, psychologists, optometrists, podiatrists, audiologists, physician assistants, certified registered nurse anesthetists, nurse practitioners, and certified nurse midwives. IHS policy specifically requires physicians and dentists to be members of the health care facility medical staff where they practice. Health care providers become medical staff members, depending on the local health care facility's capabilities and medical staff bylaws. There are three types of IHS medical staff applicants: (1) Health care providers applying for direct employment with IHS; (2) contractors who will not seek to become IHS employees; and (3) employed IHS health care providers who seek to transfer between IHS health care facilities.

National health care standards developed by the Centers for Medicare and Medicaid Services (formerly the Health Care Financing Administration), the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO), and other accrediting organizations require health care facilities to review, evaluate and verify the credentials, training and experience of medical staff applicants prior to granting medical staff privileges. In order to meet these standards, IHS health care facilities require all medical staff applicants to provide information concerning their education, training, licensure, and work experience and any adverse disciplinary actions taken against them. This information is then verified with references supplied by the applicant and may include: Former employers, educational institutions, licensure and certification boards, the American Medical Association, the Federation of State Medical Boards, the National Practitioner Data Bank, and the applicants themselves.

In addition to the initial granting of medical staff membership and clinical privileges, JCAHO standards require that a review of the medical staff be conducted not less than every two years. This review evaluates the current competence of the medical staff and verifies whether they are maintaining the licensure or certification requirements of their specialty.

The medical staff credentials and privileges records are maintained at the health care facility where the health care provider is a medical staff member. The establishment of these records at INS health care facilities is not optional; such records must be established and accredited by JCAHO. Prior to the establishment of this JCAHO requirement, the degree to which medical staff applications were maintained at all health care facilities in the United States that are verified for completeness and accuracy varied greatly across the Nation.

The application process has been streamlined and is using information technology to make the application electronically available on the Internet. *Affected Public:* Individuals and households. *Type of Respondents:* Individuals.

The table below provides: Types of data collection instruments, Estimated number of respondents, Number of annual number of responses, Average burden per response, and Total annual burden hours.

Data collection instrument(s)	Estimated number of respondents	Responses per respondent	Average burden hour per response*	Total annual burden hours
Application to Medical Staff	570	1	1.00 (60 mins)	570
Reference Letter	1710	1	0.33 (20 mins)	570
Reappointment Request	190	1	1.00 (60 mins)	190
Ob-Gyn Privileges	20	1	1.00 (60 mins)	20
Internal Medicine	325	1	1.00 (60 mins)	325
Surgery Privileges	20	1	1.00 (60 mins)	20
Psychiatry Privileges	13	1	1.00 (60 mins)	13
Anesthesia Privileges	15	1	1.00 (60 mins)	15
Dental Privileges	150	1	0.33 (20 mins)	50
Optometry Privileges	21	1	0.33 (20 mins)	7
Psychology Privileges	30	1	0.17 (10 mins)	5
Audiology Privileges	7	1	0.08 (5 mins)	1
Podiatry Privileges	7	1	0.08 (5 mins)	1
Radiology Privileges	8	1	0.33 (20 mins)	3
Pathology Privileges	3	1	0.33 (20 mins)	1
Total	3,088	.....		1,791

*For ease of understanding, burden hours are provided in actual minutes. There are no capital costs, operating costs and/or maintenance costs to respondents.

Request for Comments: Your written comments and/or suggestions are invited on one or more of the following points: (a) Whether the information collection activity is necessary to carry out an agency function; (b) whether the agency processes the information collected in a useful and timely fashion; (c) the accuracy of public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information); (d) whether the methodology and assumptions used to determine the estimate is logical; (e) ways to enhance the quality, utility, and clarity of the information being collected; and (f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Send Comments and Requests for Further Information: For the proposed collection or requests to obtain a copy of the data collection instrument(s) and instructions to: Ms. Betty Gould, Reports Clearance Officer, 801 Thompson Avenue, TMP, Suite 450, Rockville, MD 20852, call non-toll free (301) 443–7899, send via facsimile to (301) 443–9879, or send your e-mail requests, comments, and return address to: *betty.gould@ihs.gov.*

Comment Due Date: Your comments regarding this information collection is best assured of having full effect if received within 60 days of the date of this publication.

Dated: November 30, 2009.

Randy Grinnell,

Deputy Director, Indian Health Service.

[FR Doc. E9–28955 Filed 12–3–09; 8:45 am]

BILLING CODE 4165–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Jail Diversion and Trauma Recovery—Priority to Veterans Program Evaluation—NEW

The Substance Abuse and Mental Health Services Administration's (SAMHSA), Center for Mental Health Services (CMHS) has implemented the Jail Diversion and Trauma Recovery Program (JDTR)—Priority to Veterans to support local implementation and State-wide expansion of trauma-integrated jail diversion programs to reach individuals with post traumatic stress disorder (PTSD) and trauma related disorders involved in the justice system. JDTR requires grantees to implement a State infrastructure program linked to a local pilot criminal justice diversion project. At the State level, the State Mental Health Authority (SMHA) will convene a State Advisory Committee that provides oversight of pilot projects' training, diversion, service delivery and local project evaluation, as well as design and implement plans to disseminate knowledge about effective pilot projects and to replicate them in other communities in the State.

CMHS is requesting approval from the Office of Management and Budget (OMB) to implement a data collection document, the Semi-Annual Progress Report (SAPR), to evaluate the implementation, expansion, and sustainability of jail diversion and trauma informed services developed under the JDTR program.

The current proposal requests implementing the Semi-Annual Progress Report (SARP) to collect information in the following areas:

a. Document the State and pilot level goals for the project;

b. Describe the project environment, including changes that have helped or hindered implementation;

c. Estimate project spending on State, pilot, and evaluation activities;

d. Describe activities and progress on State level infrastructure change components, including barriers to progress;

e. Report on pilot project progress, including activities related to the pilot program, changes to program plans, and barriers to implementation;

f. Describe any project accomplishments, including documenting numbers and types of trainings, as well as any policy changes; and

g. Describe and update progress in meeting cross-site client evaluation requirements.

This information would be collected twice a year: in March and September. Six grantees were awarded 5-year grants in FY 2008 and six more 5-year grants were funded in FY2009. The six FY 2008 grantees piloted the data collection instrument in March of FY 2009. The six additional grantees awarded on September 30, 2009 would commence data collection in March of FY 2010. The burden estimate for completing the SAPR is as follows:

FY 2010 ANNUAL REPORTING BURDEN

Data collection activity	Number of respondents [1]	Responses per respondent [2]	Total responses	Average hours per response	Total hour burden
Semi-Annual Progress report	[2] 12	1	12	15	180
Overall Total	12		12		180

[1] The respondents are the States.
[2] The Project Director for each Grantee is responsible for compiling and submitting the SAPR.

FY 2011 ANNUAL REPORTING BURDEN

Data collection activity	Number of respondents [1]	Responses per respondent [2]	Total responses	Average hours per response	Total hour burden
Semi-Annual Progress report	12	2	24	15	360
Overall Total	12		24		360

[1] The respondents are the States.
[2] The Project Director for each Grantee is responsible for compiling and submitting the SAPR.

FY 2012 ANNUAL REPORTING BURDEN

Data collection activity	Number of respondents [1]	Responses per respondent [2]	Total responses	Average hours per response	Total hour burden
Semi-Annual Progress report	12	2	24	15	360
Overall Total	12		24		360

[1] The respondents are the States.
[2] The Project Director for each Grantee is responsible for compiling and submitting the SAPR

FY 2013 ANNUAL REPORTING BURDEN

Data collection activity	Number of respondents [1]	Responses per respondent [2]	Total responses	Average hours per response	Total hour burden
Semi-Annual Progress report	12	2	24	15	360
Overall Total	12		24		360

[1] The respondents are the States.
[2] The Project Director for each Grantee is responsible for compiling and submitting the SAPR.

ANNUALIZED REPORTING BURDEN

Data collection activity	Annualized number of respondents	Annualized total responses	Annualized total hour burden
Semi-Annual Progress Report	12	21	315

Written comments and recommendations concerning the proposed information collection should be sent by January 4, 2010 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–5806.

Dated: November 25, 2009.

Elaine Parry,

Director, Office of Program Services.

[FR Doc. E9–28953 Filed 12–3–09; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Proposed Project: 2010 National Mental Health Services Survey (N–MHSS) (OMB No. 0930–0119)—Revision

The Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Mental Health Services (CMHS) will conduct the 2010 N–MHSS. This national survey will update the previous biennial mental health facility survey conducted in 2008—the National Survey of Mental Health Treatment Facilities (NSMHTF) under OMB No. 0930–0119. Similar in design to the 2008 NSMHTF, the 2010 N–MHSS will survey all mental health service locations, instead of surveying each mental health organization as a whole. These separate mental health service locations (facilities) are in contrast to mental health organizations which may include multiple facilities (service locations). This survey will be (a) a 100-percent enumeration of all known facilities nationwide that specialize in mental health treatment services, (b) more consumer-oriented in describing services available at each facility location, and (c) patterned after SAMHSA's Office of Applied Studies National Survey of Substance Abuse Treatment Services (OMB No. 0930–0106).

The 2010 N–MHSS will utilize one questionnaire for all mental health facility types including hospitals, residential treatment centers, outpatient clinics, and multi-setting facilities. The information collected will include: intake telephone numbers for services, types of services offered, sources of payment for services, facility caseload characteristics, and facility bed counts, if applicable. This survey will use a multi-mode approach to data collection—mail and web with telephone follow up.

The resulting database will be used to provide both state and national estimates of facility types and their patient caseloads. Information from the 2010 survey will also be used to update SAMHSA's online Mental Health Facility Locator for use by consumers. In addition, data derived from the survey will be published by CMHS in SAMHSA publications such as *Mental Health, United States* and in professional journals such as *Psychiatric Services and the American Journal of Psychiatry.* The publication, *Mental Health, United States,* is used by the general public, State governments, the U.S. Congress, university researchers, mental health service providers, and mental health care professionals. The following Table summarizes the estimated response burden for the survey.

ESTIMATED TOTAL RESPONSE BURDEN FOR THE 2010 N MHSS

Facility type	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden
Public Psychiatric Hospitals	305	1	305	1	305
Private Psychiatric Hospitals	536	1	536	1	536
General Hospitals with Separate Psychiatric Units	1,719	1	1,719	1	1,719
Residential Treatment Centers for Adults	833	1	833	1	833
Residential Treatment Centers for Children	1,191	1	1,191	1	1,191

ESTIMATED TOTAL RESPONSE BURDEN FOR THE 2010 N MHSS—Continued

Facility type	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden
Outpatient Clinics (including Hospital-Based)	6,292	1	6,292	1	6,292
Multi-Setting Community Facilities	2,124	1	2,124	1	2,124
Total	13,000		13,000		13,000

Written comments and recommendations concerning the proposed information collection should be sent by January 4, 2010 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–5806.

Dated: November 25, 2009.

Elaine Parry,

Director, Office of Program Services.

[FR Doc. E9–28950 Filed 12–3–09; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0539]

Draft Guidance for Industry on Assay Development for Immunogenicity Testing of Therapeutic Proteins; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Assay Development for Immunogenicity Testing of Therapeutic Proteins.'' The draft guidance provides recommendations to facilitate industry's development of immune assays for assessment of the immunogenicity of therapeutic proteins during clinical trials.

DATES: Submit written or electronic comments on the draft guidance by February 2, 2010. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002; Office of Communication, Outreach, and Development (HFM–40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

Susan Kirshner, Center for Drug Evaluation and Research (HFD–122), Food and Drug Administration, 8800 Rockville Pike, Bldg. N29A, rm. 2D16, Bethesda, MD 20892, 301–827–1731; or

Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Assay Development for Immunogenicity Testing of Therapeutic Proteins.'' This guidance was created by a working group that consisted of staff from the Center for Drug Evaluation and Research (CDER) and the Center for Biologics Evaluation and Research (CBER). Because clinicians rely on the observed immunogenicity rates listed in the ''Immunogenicity'' section of drug labeling, development of validated, sensitive immune assays is critical to patient care. This guidance discusses immunogenicity testing during drug product development and provides recommendations on assay development, clinical aspects of assay validation, assay validation, assay testing implementation, and other aspects of immunogenicity testing.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on the development of immune assays for assessment of the immunogenicity of therapeutic proteins during clinical trials. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov*.

Dated: December 1, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–28960 Filed 12–3–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0542]

Draft Guidance for Industry: Factors That Distinguish Liquid Dietary Supplements From Beverages, Considerations Regarding Novel Ingredients, and Labeling for Beverages and Other Conventional Foods; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled ''Guidance for Industry: Factors that Distinguish Liquid Dietary Supplements from Beverages, Considerations Regarding Novel Ingredients, and Labeling for Beverages and Other Conventional Foods.'' The draft guidance describes factors that can be used to identify liquid products that are excluded from being dietary supplements because they are represented as conventional foods. Further, the draft guidance reminds manufacturers and distributors of beverages and other conventional foods, particularly those that contain novel ingredients, about the requirements of the Federal Food, Drug, and Cosmetic Act (the act) regarding ingredients and labeling.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on the draft guidance before it begins work on the final version of the guidance, submit electronic or written comments on the draft guidance by February 2, 2010.

ADDRESSES: Submit electronic comments on the draft guidance to *http://www.regulations.gov*. Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit written requests for single copies of the draft guidance to the Office of Nutrition, Labeling, and Dietary Supplements, Center for Food Safety and Applied Nutrition (HFS–800), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance.

FOR FURTHER INFORMATION CONTACT: Robert Moore, Center for Food Safety and Applied Nutrition (HFS–810), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2375.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance entitled ''Guidance for Industry: Factors that Distinguish Liquid Dietary Supplements from Beverages, Considerations Regarding Novel Ingredients, and Labeling for Beverages and Other Conventional Foods.'' The draft guidance is intended to assist dietary supplement and beverage manufacturers and distributors in reaching a determination as to whether a liquid product may be labeled and marketed as a dietary supplement. The draft guidance describes factors that manufacturers and distributors can use to identify liquid products that are excluded from being dietary supplements because they are represented as conventional foods. Further, the draft guidance reminds manufacturers and distributors of beverages and other conventional foods, particularly those that contain novel ingredients, about the requirements of the act regarding ingredients and labeling.

FDA is issuing this draft guidance as Level 1 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on the topics discussed. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternate approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments regarding the draft guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at *http://www.fda.gov/FoodGuidances* or *http://www.regulations.gov*.

Dated: November 30, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–28926 Filed 12–3–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; SARS Replication.

Date: January 19, 2010.

Time: 11:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817. (Telephone Conference Call)

Contact Person: Brenda Lange-Gustafson, PhD, Scientific Review Officer, NIAID/NIH/DHHS, Scientific Review Program, Room 3122, 6700–B Rockledge Drive, MSC–7616, Bethesda, MD 20892–7616, 301–451–3684, *bgustafson@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 30, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29010 Filed 12–3–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Research Resources Special Emphasis Panel; ARRA Dec. C06.

Date: December 15–17, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call)

Contact Person: Barbara J. Nelson, PhD, Scientific Review Officer, Office of Review, National Center For Research Resources, 6701 Democracy Blvd. Room 1080, 1 Democracy Plaza, Bethesda, MD 20892, 301–435–0806, *nelsonbj@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards., National Institutes of Health, HHS)

Dated: November 30, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29009 Filed 12–3–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Inherited Disease Research Access Committee.

Date: January 8, 2010.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Camilla E. Day, PhD, Scientific Review Officer, CIDR, National Human Genome Research Institute, National Institutes of Health, 5635 Fishers Lane, Suite 4075, Bethesda, MD 20892, 301–402–8837, *camilla.day@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: November 30, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29007 Filed 12–3–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Human Genome Research Institute Special Emphasis Panel; GTEx-LDACC Contract Review.

Date: December 11, 2009.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: NHGRI Twinbrook Library, 5635 Fishers Lane, 4076, Rockville, MD 20852.

Contact Person: Rudy O. Pozzatti, PhD, Scientific Review Officer, Scientific Review Branch, National Human Genome Research Institute, 5635 Fishers Lane, Suite 4076, MSC 9306, Rockville, MD 20852, (301) 402–0838, *pozzattr@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: November 30, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–29006 Filed 12–3–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; N43 DA–10–5558 Development of State of the Art Mechanisms for Epidemiological Research.

Date: December 15, 2009.

Time: 9 a.m. to 12 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call)

Contact Person: Nadine Rogers, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–402–2105, *rogersn2@nida.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: November 30, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–28990 Filed 12–3–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Development and Aging.

Date: December 16, 2009.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Sherry L. Dupere, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5136, MSC 7843, Bethesda, MD 20892, (301) 435–1021, *duperes@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 30, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–28988 Filed 12–3–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Requirement for Persons Making Payment by Check to CBP To Provide Their Taxpayer Identifying Number

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice announces that all persons making payment to Customs and Border Protection (CBP) by check must provide their Taxpayer Identifying Number (TIN) when paying CBP. The TIN should be written on the face of the check. Providing the TIN on the face of the check will facilitate payment processing.

DATES: *Effective Date:* December 4, 2009.

FOR FURTHER INFORMATION CONTACT: Nanette Voll, Office of Finance, Revenue Division, Customs and Border Protection, Tel.: (317) 614–4458.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the *Debt Collection Improvement Act of 1996,* 31 U.S.C. 7701(c), persons ''doing business'' with Federal agencies, which includes persons engaging in activities that may require making payments to Customs and Border Protection (CBP), are required by law to provide their Taxpayer Identifying Number (TIN) to the agency. ''Taxpayer identifying number'' is defined in 31 U.S.C. 7701(a)(2) as the identifying number required under section 6109 of the Internal Revenue Code of 1986 (26 U.S.C. 6109). Section 6109(d) provides that a social security account number constitutes the taxpayer identifying number for purposes of Title 26, unless otherwise specified by the Secretary of the Treasury. It is further noted that the Internal Revenue Service regulations, at 26 CFR 301.7701–12, indicate that an employer identification number is a taxpayer identifying number for purposes of 26 U.S.C. 6109.

This notice announces that all persons making payment to the agency, by any type of check and for any amount, should include the requisite TIN, either the social security account number or employer identification number, on the face of the submitted checks. Submission of TIN data in this manner will facilitate payment processing using Paper Check Conversion Over the Counter [PCC OTC] software. PCC OTC has been used by CBP since 2006 to scan checks submitted for the payment of customs charges. The scanned images are maintained in a database by Financial Management Services, U.S. Department of the Treasury, and a legally sufficient substitute image of the check is transmitted through the banking network for payment. Inclusion of TIN on the face of all checks submitted to CBP will ensure that this data is collected and processed in a uniform and secure manner.

Dated: November 23, 2009.

Elaine Killoran,

Acting Assistant Commissioner, Office of Finance.

[FR Doc. E9–28905 Filed 12–3–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5280–N–47]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7266, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Rita, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.,* acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: COAST GUARD: Commandant, United States Coast Guard, Attn: Jennifer Stomber, 2100 Second St., SW., Stop 7901, Washington, DC 20314; (202) 475–5609; COE: Mr. Scott Whiteford, Army Corps of Engineers, Real Estate, CEMP–CR, 441 G Street, NW., Washington, DC 20314; (202) 761–5542; ENERGY: Mr. Mark Price, Department of Energy, Office of Engineering & Construction Management, MA–50, 1000 Independence Ave, SW., Washington, DC 20585: (202) 586–5422; INTERIOR: Mr. Michael Wright, Acquisition & Property Management, Department of the Interior, 1849 C Street, NW., MS2603, Washington, DC 20240; (202) 208–5399; NAVY: Mrs. Mary Arndt, Acting Director, Department of the Navy, Real Estate Services, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9305; (These are not toll-free numbers).

Dated: November 24, 2009.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

Title V, Federal Surplus Property Program—Federal Register Report for 12/04/2009

Suitable/Available Properties

Land

South Dakota

Portion/Tract A127,
Gavins Point Dam,
Yankton, SD.
Landholding Agency: COE.
Property Number: 31200940001.
Status: Unutilized.
Comments: 0.3018 acre, road right of way.

Hawaii

Portion of Lot 36–D/69–B,
Navy Region,
Pearl Harbor, HI 96860.
Landholding Agency: Navy.
Property Number: 77200940011.
Status: Unutilized.
Comments: 7000 sq. ft.

California

Bldgs. 438, 490, 666, 666A,
Camino del Canyon,
Mill Valley, CA 94941.
Landholding Agency: Interior.
Property Number: 61200940001.
Status: Unutilized.
Reasons: Extensive deterioration.

Bettencourt House,
Golden Gate Park,
Mill Valley, CA 94941.
Landholding Agency: Interior.
Property Number: 61200940002.
Status: Unutilized.
Reasons: Extensive deterioration.

Unit 817A & B,
Marin Headlands,
Golden Gate Park,
Sausalito, CA 94965.
Landholding Agency: Interior.
Property Number: 61200940003.
Status: Unutilized.
Reasons: Extensive deterioration.

6 Bldgs.,
Marine Corps Air Station,
Miramar, CA.
Landholding Agency: Navy.
Property Number: 77200940009.
Status: Excess.
Directions: 9618, 9278T, 2003T, 1271T, 1272T, 2740T.
Reasons: Secured Area, Extensive deterioration.

Bldg. 01325,
Naval Air Weapons Station,
China Lake, CA 93555.
Landholding Agency: Navy.
Property Number: 77200940010.
Status: Unutilized.
Reasons: Extensive deterioration, Secured Area.

Bldg. 54,
USCG Island Base Support,
Alameda, CA.
Landholding Agency: Coast Guard.
Property Number: 88200940002.
Status: Unutilized.
Reasons: Secured Area.

Illinois

Trailer,
Rend Lake Project,
Benton, IL 62812.
Landholding Agency: COE.
Property Number: 31200940003.
Status: Excess.
Reasons: Extensive deterioration.

Iowa

5 Bldgs.,
Rathbun Project,
Centerville, IA 52544.
Landholding Agency: COE.
Property Number: 31200940002.
Status: Unutilized.
Directions: 29333, 29376, 29306, 29309, 29323.
Reasons: Extensive deterioration.

Kansas

4 Comfort Stations,
Tuttle Creek Lake,
Manhattan, KS 66502.
Landholding Agency: COE.
Property Number: 31200940004.
Status: Unutilized.
Reasons: Extensive deterioration.

Kentucky

Launching Ramp,

Wolf Creek Dam,
Somerset, KY 42501.
Landholding Agency: COE.
Property Number: 31200940005.
Status: Unutilized.
Reasons: Floodway.

Missouri

9 Bldgs.,
Pomme de Terre Lake,
Hermitage, MO 65668.
Landholding Agency: COE.
Property Number: 31200940007.
Status: Unutilized.
Reasons: Floodway.

Fee Booth,
Hawker Point Park,
Stockton, MO 65785.
Landholding Agency: COE.
Property Number: 31200940008.
Status: Excess.
Reasons: Extensive deterioration.

5 Well Houses,
Wappapello Lake Project,
Wayne, MO 63966.
Landholding Agency: COE.
Property Number: 31200940009.
Status: Unutilized.
Reasons: Extensive deterioration.

New Mexico

9 Bldgs.,
Los Alamos National Lab,
Los Alamos, NM 87545.
Landholding Agency: Energy.
Property Number: 41200940005.
Status: Unutilized.
Directions: 35–0046, 35–0224, 35–0226, 35–0227, 35–0249, 35–0250, 35–0256, 35–0337, 35–0382.
Reasons: Secured Area, Extensive deterioration.

North Carolina

Bldgs. GH1, FA1,
U.S. Coast Guard Station,
Hatteras, NC 27943.
Landholding Agency: Coast Guard.
Property Number: 88200940003.
Status: Unutilized.
Reasons: Extensive deterioration.

Oklahoma

Bldg. 43992,
Fort Gibson Lake,
Fort Gibson, OK 74434.
Landholding Agency: COE.
Property Number: 31200940010.
Status: Unutilized.
Reasons: Extensive deterioration.

Bldgs. 43847, 43783,
Hugo Lake,
Sawyer, OK 74756.
Landholding Agency: COE.
Property Number: 31200940011.
Status: Unutilized.
Reasons: Extensive deterioration.

32 Bldgs.,
Optima Lake,
Texas, OK.
Landholding Agency: COE.
Property Number: 31200940012.
Status: Unutilized.
Reasons: Extensive deterioration.

Oregon

Restroom—V0035,
McNary Lock & Dam,
Umatilla, OR.
Landholding Agency: COE.
Property Number: 31200940013.
Status: Unutilized.
Reasons: Extensive deterioration.

Texas

Boat Dock,
Pat Mayse Lake,
Powderly, TX 75473.
Landholding Agency: COE.
Property Number: 31200940014.
Status: Unutilized.
Reasons: Extensive deterioration.

Old USMC Training Center,
Fort Point,
Galveston, TX 77550.
Landholding Agency: COE.
Property Number: 31200940015.
Status: Unutilized.
Reasons: Extensive deterioration.

Virginia

Bldgs. 22624, 41438, 41439,
John Flannagan Dam,
Haysi, VA 24256.
Landholding Agency: COE.
Property Number: 31200940016.
Status: Unutilized.
Reasons: Extensive deterioration.

9 Bldgs.,
Philpott Lake & Dam,
Bassett, VA 24055.
Landholding Agency: COE.
Property Number: 31200940017.
Status: Unutilized.
Directions: 15640, 16753, 16775, 16883, 18840, 18854, 18835, 16749, 15636.
Reasons: Extensive deterioration.

Bldgs. 17454, 17455,
John Kerr Lake & Dam,
Boydton, VA 23917.
Landholding Agency: COE.
Property Number: 31200940018.
Status: Unutilized.
Reasons: Extensive deterioration.

Bldgs. 3112, 3113,
Marine Corps Base,
Quantico, VA.
Landholding Agency: Navy.
Property Number: 77200940007.
Status: Unutilized.
Reasons: Extensive deterioration.

Bldg. 1200,
Naval Support Activity,
Dahlgren, VA 22448.
Landholding Agency: Navy.
Property Number: 77200940008.
Status: Excess.
Reasons: Extensive deterioration.

Land

Minnesota

Portion/Tract Wa-63,
Wabasha, MN.
Landholding Agency: COE.
Property Number: 31200940006.
Status: Unutilized.
Reasons: Other—inaccessible.

[FR Doc. E9–28623 Filed 12–3–09; 8:45 am]
BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

30-Day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: Department of Interior, National Park Service.

ACTION: Notice and request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13,44 U.S.C., Chapter 3507) and 5 CFR Part 1320, Reporting and Record Keeping Requirements, the National Park Service (NPS) invites public comments on an extension of a currently approved information collection (OMB # 1024–0064).

DATES: Public comments on this Information Collection Request (ICR) will be accepted on or before January 4, 2010.

ADDRESSES: You may submit comments directly to the Desk Officer for the Department of the Interior (OMB #1024–0064), Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), by fax at 202/395–5806, or by electronic mail at *oira_docket@omb.eop.gov.* Please also mail or hand carry a copy of your comments to Edward O. Kassman, Jr., Regulatory Specialist, Planning, Evaluation & Permits Branch, Geologic Resources Division, National Park Service, P.O. Box 25287, Lakewood, Colorado 80225; or via fax at (303) 987–6792 or via e-mail at *Edward_Kassman@nps.gov.*

FOR FURTHER INFORMATION CONTACT: Edward O. Kassman, Jr., Regulatory Specialist, Planning, Evaluation & Permits Branch, Geologic Resources Division, National Park Service, P.O. Box 25287, Lakewood, Colorado 80225; or via fax at (303) 987–6792 or via e-mail at *Edward_Kassman@nps.gov.* You are entitled to a copy of the entire ICR package free-of-charge. You may access this ICR at *http://www.reginfo.gov/public/.*

Comments Received on the 60–Day **Federal Register** Notice:

The NPS published a 60-day notice to solicit public comments on this ICR in the **Federal Register** on May 26, 2009 (74 FR 24871). The comment period closed on July 27, 2009. No comments were received on this notice.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1024–0064.

Title: NPS/Minerals Management Program/Mining Claims and Non-Federal Oil and Gas Rights—36 CFR

Part 9, Subpart A and Subpart B, respectively.

Form(s): None.

Type of Request: Extension of a currently approved collection of information.

Description of Need: The NPS regulates mineral development activities inside park boundaries on mining claims and on non-Federal oil and gas rights under regulations codified at 36 CFR part 9, subpart A (''9A regulations''), and 36 CFR part 9, subpart B (''9B Regulations''), respectively. The NPS promulgated both sets of regulations in the late 1970s. In the case of mining claims, the NPS promulgated the 9A regulations pursuant to congressional authority granted under the Mining in the Parks Act of 1976, 16 U.S.C. 1901 *et seq.,* and individual park enabling statutes. For non-Federal oil and gas rights, the NPS regulates development activities pursuant to authority under the NPS Organic Act of 1916, 16 U.S.C. 1 *et seq.,* and individual enabling statutes. As directed by Congress, the NPS developed the regulations in order to protect park resources and visitor values from the adverse impacts associated with mineral development in park boundaries.

Affected Public: Medium to large publicly owned companies and private entities.

Obligation to Respond: Required to receive a benefit.

Frequency of Response: 1 per respondent, 24 respondents per year.

Estimated total annual responses: 24 per year.

Estimated average completion time per response: 176 Hours.

Estimated annual reporting burden: 4224 hours.

Estimated annual nonhour cost burden: 0.

Comments are invited on: (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden to respondents, including use of automated information collection techniques or other forms of information technology. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Dated: December 01, 2009.

Cartina Miller,

NPS, Information Collection Clearance Officer.

[FR Doc. E9–29021 Filed 12–3–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAC09000 L16100000.DP0000]

Notice of Availability of Draft Resource Management Plan and Draft Environmental Impact Statement for the Clear Creek Management Area, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) has prepared a Draft Resource Management Plan and Draft Environmental Impact Statement (RMP/EIS) for the Clear Creek Management Area (CCMA), and by this notice, announces the opening of the public comment period.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Draft RMP/EIS within 90 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register.** The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, media news releases, and/or mailings.

ADDRESSES: You may submit comments at the public meetings or by any of the following methods:

- Mail Address: BLM Hollister Field Office, 20 Hamilton Court, Hollister, California 95023.
- E-mail: *cahormp@ca.blm.gov.*
- Fax: (831) 630–5055.

The CCMA Draft RMP/EIS is available on-line at: *http://www.ca.blm.gov/hollister.* Compact discs (CDs) of the CCMA Draft RMP/EIS are available at the Hollister Field Office at the above address; CD copies are also available at the BLM California State Office, 2800 Cottage Way, Sacramento, California 95825.

FOR FURTHER INFORMATION CONTACT: Sky Murphy, BLM Hollister Field Office, 20 Hamilton Court, Hollister, California 95023, (831) 630–5039.

SUPPLEMENTARY INFORMATION: The planning area covers approximately 75,000 surface acres and approximately 3,500 acres of subsurface mineral estate in San Benito and Fresno counties, California. The CCMA RMP, when completed, will provide management guidance for use and protection of the resources managed by the Hollister Field Office. The CCMA Draft RMP/EIS has been developed through a collaborative planning process among local, State, and Federal agencies and considers seven alternatives. The primary issues addressed include public health and safety, recreation, protection of sensitive natural and cultural resources, livestock grazing, guidance for energy and mineral development, land tenure adjustments, and other planning issues raised during the scoping process.

The Draft RMP/EIS also designates an Area of Critical Environmental Concern (ACEC). The preferred alternative would carry forward the designation of the existing 30,200-acre Clear Creek Serpentine ACEC to protect public health and safety and other resource values identified in the Draft RMP/EIS. Restrictions on the use of public lands within the Serpentine ACEC to minimize human health risks from exposure to asbestos and reduce airborne emissions of asbestos from BLM management activities vary among the range of alternatives, but are likely to include limitations on motorized vehicle use and many other surface disturbing activities.

Please note that public comments and information submitted including names, street addresses, and e-mail addresses of respondents will be available for public review and disclosure at the above address during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we

cannot guarantee that we will be able to do so.

Dianna Brink,

Acting Deputy State Director for Natural Resources.

[FR Doc. E9–28867 Filed 12–3–09; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–MB–2009–N254; [91200–1231–9BPP–L2]

Service Regulations Committee Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The Fish and Wildlife Service (hereinafter Service) will conduct an open meeting on February 3, 2010, to identify and discuss preliminary issues concerning the 2010–11 migratory bird hunting regulations.

DATES: The meeting will be held February 3, 2010.

ADDRESSES: The Service Regulations Committee will meet at the Embassy Suites Hotel, Denver—International Airport, 7001 Yampa Street, Denver, CO (303) 574–3000.

FOR FURTHER INFORMATION CONTACT: Robert Blohm, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms–4107–ARLSQ, 1849 C Street, NW., Washington, DC 20240, (703) 358–1714.

SUPPLEMENTARY INFORMATION: Under the authority of the Migratory Bird Treaty Act (16 U.S.C. 703–712), the Service regulates the hunting of migratory game birds. We update the migratory game bird hunting regulations, located at 50 CFR part 20, annually. Through these regulations, we establish the frameworks, or outside limits, for season lengths, bag limits, and areas for migratory game bird hunting. To help us in this process, we have administratively divided the nation into four Flyways (Atlantic, Mississippi, Central, and Pacific), each of which has a Flyway Council. Representatives from the Service, the Service's Migratory Bird Regulations Committee, and Flyway Council Consultants will meet on February 3, 2010, at 8:30 a.m. to identify preliminary issues concerning the 2010–11 migratory bird hunting regulations for discussion and review by the Flyway Councils at their March meetings.

In accordance with Department of the Interior (hereinafter Department) policy regarding meetings of the Service Regulations Committee attended by any person outside the Department, these meetings are open to public observation.

Dated: November 23, 2009.

Paul R. Schmidt,

Assistant Director, Migratory Birds, U.S. Fish and Wildlife Service.

[FR Doc. E9–28987 Filed 12–3–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

The National Environmental Policy Act Procedures Manual

AGENCY: The National Indian Gaming Commission, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to provide an opportunity for public review and comment on the National Indian Gaming Commission (NIGC) draft manual containing policy and procedures for implementing the National Environmental Policy Act of 1969 (NEPA), as amended, Executive Order 11514, as amended, and Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA. Pursuant to CEQ regulations, the NIGC is soliciting comments on its proposed procedures from members of the interested public.

DATES: Comments and related material must be post marked no later than 45 days after publication of this notice.

ADDRESSES: Please submit your comments by only one of the following means: (1) By mail to: Brad Mehaffy, National Indian Gaming Commission, 1441 L Street, NW., Suite 9100, Washington, DC 20005; (2) by hand delivery to: National Indian Gaming Commission, 1441 L Street, NW., Suite 9100, Washington, DC 20005; (3) by facsimile to: (202) 632–7066; (4) by e-mail to: *nepa_procedures@nigc.gov;* or (5) online at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bradley Mehaffy, NEPA Compliance Officer at the National Indian Gaming Commission: 202–632–7003 or by facsimile at 303–632–7066 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The NIGC encourages interested persons to submit written comments. Persons submitting information concerning the NEPA Procedures Manual should include their name, address, and other appropriate contact information. You may submit your information by one of the means listed under **ADDRESSES**. If you submit information by mail or hand delivery, submit them in an unbound format, no larger than 8 ½ by 11 inches, suitable for copying and electronic filing. If you submit information by mail and would like to know it was received, please enclose a stamped, self-addressed postcard or envelope. The NIGC will consider all comments received during the comment period.

Background

This manual will clarify policy and procedures to ensure the integration of environmental considerations into major Federal actions of the NIGC that trigger NEPA review. At present, the NIGC has identified only one type of major Federal action that it performs under the Indian Gaming Regulatory Act (IGRA) that triggers NEPA review—approving contracts for the management of Indian gaming facilities pursuant to 25 U.S.C. 2711. This manual clarifies the NEPA-related roles and responsibilities and establishes a framework for the preparation and consideration of appropriate NEPA documentation, thereby ensuring a balanced and systematic consideration of environmental impacts in the decision-making process of the NIGC.

The proposed manual includes processes for preparing Environmental Assessments, Findings of No Significant Impact, and Environmental Impact Statements. The NIGC proposes to use this manual in conjunction with NEPA, the CEQ regulations at 40 CFR 1500–1508, and other pertinent environmental regulations, Executive Orders, statutes, and laws developed for the consideration of environmental impacts of Federal actions.

This manual identifies several categories of actions taken by the NIGC that are categorically excluded from further NEPA review. In identifying these categories of actions, the NIGC relied on several environmental professionals' opinions and comparisons with other Federal agency actions that are categorically excluded.

A copy of this **Federal Register** publication, as well as the administrative record for the list of categorical exclusions, is available at *http://www.nigc.gov/Portals/0/NIGC%20Uploads/EPHS/projectsapproved/MANUAL07.pdf.*

A copy of the **Federal Register** publication is available at *http://www.regulations.gov.* The NIGC solicits public review of its draft NEPA Procedures Manual and will review and consider those comments before the manual is finalized.

National Environmental Policy Act Procedures Manual Forward

This manual was prepared and intended for use by the National Indian Gaming Commission (NIGC) and those parties who seek approval of the NIGC in undertaking actions pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701–2721. Specifically, NIGC personnel, Indian gaming proponents (Tribes), their management or development contractors, and those contractors/consultants involved in the development of environmental review documents must use this manual in order to ensure compliance with the applicable requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321–4347. These procedures are adopted pursuant to the procedural and substantive requirements established by the White House Council on Environmental Quality (CEQ) in its NEPA implementing regulations, 40 CFR 1505.1 and 1507.3.

As of the publication date of this procedures manual, the NIGC has identified only one type of major Federal action it undertakes that requires review under NEPA—approving third-party management contracts for the operation of gaming activity under IGRA, 25 U.S.C. 2711, and the NIGC's implementing regulations, 25 CFR part 533. Depending on the nature of the subject contract and other circumstances, approval of such management contracts may be categorically excluded from NEPA review (*See* Chapter 3); it may require the preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) (*See* Chapter 4); or it may require the preparation of an Environmental Impact Statement (EIS) and Record of Decision (ROD) (*See* Chapter 5). In any case, the proponents of the management contract will be expected to assist the NIGC develop the required NEPA documentation, primarily by paying for environmental consultants to gather information and prepare the required documentation.

The NIGC is aware that the preparation of NEPA documents can be expensive. By adopting this procedures manual, the NIGC hopes to reduce such costs by making clear its procedural and substantive requirements so that Indian Tribes and their management partners will know what is expected and can plan accordingly.

Acronym List

BIA Bureau of Indian Affairs
CADD Computer Aided Design and Drafting
CATEX Categorically Excluded
CEQ Council on Environmental Quality
CFR Code of Federal Regulations
CZMA Coastal Zone Management Act
EA Environmental Assessment
EIS Environmental Impact Statement
EMS Environmental Management System
EO Executive Order
EPA Environmental Protection Agency
ESA Endangered Species Act
FOIA Freedom of Information Act
FONSI Finding of No Significant Impact
GIS Geographic Information System
IGRA Indian Gaming Regulatory Act
LOS Level of Service
MOU Memorandum of Understanding
NEPA National Environmental Policy Act
NHPA National Historic Preservation Act
NIGC National Indian Gaming Commission
NOA Notice of Availability
NOI Notice of Intent
OGC Office of General Council
POC Point of Contact
ROD Record of Decision
SHPO State Historic Preservation Office(r)
SOW Scope of Work
THPO Tribal Historic Preservation Office(r)

Chapter 1: Introduction

1.1 Purpose. This manual provides National Indian Gaming Commission (NIGC) policy and procedures to ensure agency compliance with the requirements set forth in the Council on Environmental Quality (CEQ) regulations for implementing the provisions of the National Environmental Policy Act of 1969, as amended, (NEPA), 42 U.S.C. 4321–4347, 40 Code of Federal Regulations (CFR) parts 1500–1508 and other related statutes and directives.

1.2 Distribution. Notice of adoption and availability of this manual is distributed to all NIGC Directors and the General Counsel for distribution to appropriate NIGC personnel. The manual is available to Indian Gaming proponents, environmental consultants, the public, and other interested parties in electronic form. The manual will be located for viewing and downloading at *http://www.nigc.gov* by clicking on the link to the Environmental, Public Health and Safety page. If the public does not have access to the Internet, they may obtain a computer disc containing the manual or a paper copy by contacting the NEPA Compliance Officer at (202) 632–7003 or in writing at 1441 L Street, NW., Suite 9100, Washington, DC 20005. The NIGC reserves the right to charge a fee equal to the reproduction costs.

1.3 Cancellation. (SECTION RESERVED)

1.4 Authority. NEPA and its implementing regulations, promulgated by CEQ in accordance with Executive Order (E.O.) 11514, Protection and Enhancement of Environmental Quality, March 5, 1970, as amended by E.O. 11991 (sections 2(g) and 3(h)), May 24, 1977, establish a broad national policy to protect and enhance the quality of the human environment, and develop programs and measures to meet national environmental goals. Section 101 of NEPA sets forth Federal policies and goals to encourage productive harmony between people and their environment. Section 102(2) provides specific direction to Federal agencies, sometimes called ''action-forcing'' provisions (40 CFR 1500.1(a), 1500.3, and 1507) on how to implement the goals of NEPA. The major provisions include the requirement to use a systematic, interdisciplinary approach (section 102(2)(A)) and develop implementing methods and procedures (section 102(2)(B)). Section 102(2)(C) requires detailed analysis for proposed major Federal actions significantly affecting the quality of the human environment, providing authority to prepare environmental impact statements (EISs).

1.5 Policy. It is the NIGC's policy to:

1.5.1 Comply with the procedures and policies of NEPA and other related environmental laws, regulations, and orders applicable to NIGC actions. The NIGC furthermore shall provide guidance designed to enhance and protect the national, Tribal, State and local environmental quality that may be impacted by NIGC actions;

1.5.2 Seek and develop partnerships and cooperative agreements with other Federal, Tribal, State and local organizations/departments/agencies early in the NEPA process;

1.5.3 Ensure that NEPA compliance and its documentation includes public involvement. Public involvement shall be sought during the appropriate stages of the NEPA process. Public involvement also includes disclosing information in a timely fashion to assist in the public's understanding of NIGC actions and impacts associated with those actions;

1.5.4 Interpret and administer, to the fullest extent possible, the policies, regulations, and public laws of the United States administered by the NIGC, including IGRA, in accordance with sections 101 and 102 of NEPA;

1.5.5 Consider the environmental factors and potential impacts of Tribal proposals and NIGC actions;

1.5.6 Consult and coordinate with, and consider policies and procedures of other Federal, tribal, State and local organizations/departments/agencies;

1.5.7 Employ a systematic and interdisciplinary approach to NEPA compliance and documentation prior to taking a major Federal action, such as approving a third-party management contract.

1.6 General Responsibilities. All NIGC officials (including the NIGC

Chairman, NEPA Compliance Officer, and other NIGC staff) responsible for making decisions are also responsible for taking the requirements of NEPA into account in those decisions.

1.7 Scope. The NEPA process evaluates, identifies, and addresses impacts of the NIGC's actions on the human environment, including but not limited to noise, socioeconomic factors, land uses, air quality, and water quality. Chapter 2 of this manual presents an overview of the NEPA process. Depending upon the context and potential impacts, NEPA processes can differ. Chapter 3 of this manual addresses those types of NIGC actions that do not normally require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), called categorical exclusions, absent extraordinary circumstances. Chapters 4 and 5 of this manual outline the processes for preparing EAs and EISs. These procedures apply to classes of NIGC actions that have or may have a significant impact on the human environment. Appendix A, ''Environmental Impact Categories,'' presents a list of environmental resource categories to be evaluated in all EAs or EISs prepared for or submitted to the NIGC. Appendix B contains a draft Memorandum of Understanding that outlines the roles and responsibilities of cooperating agencies. The draft shall be used as a template. Appendix C provides Third Party Contracting guidance.

1.8 Definitions

1.8.1 The terminology used in the CEQ regulations (*See* 40 CFR part 1508) and title 49 of the United States Code is applicable.

1.8.2 *Controversial* means a substantial dispute exists as to the size, nature, or effect of the proposed action. The effects of an action are considered highly controversial when a reasonable disagreement exists over the proposed action's/project's risk of causing environmental effects. Opposition of this nature from Federal, tribal, State, or local agencies/organizations or by a substantial number of persons affected by the proposed action should be considered in determining whether or not a reasonable disagreement exists.

1.8.3 *Human environment* shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

1.8.4 *Reasonable alternatives* means those alternatives that meet the purpose and need statement. In some cases, where there is a consensus among all interested parties regarding the proposed action, other alternatives are not necessary. (*See* CEQ Guidance Memo, ''Emergency Actions and NEPA,'' dated September 8, 2005, and Section 102(2)(E) of NEPA). The NIGC may consider economics, technical feasibility, and agency statutory missions when establishing the range of reasonable alternatives studied in an EA or EIS (*See* 40 CFR 1505.2(b)).

1.8.5 *Proposed action(s)* can take two different forms. The first are proposed actions that the NIGC is initiating and will undertake on its own. These are actions where the NIGC will be solely responsible for analyses and documentation of the environmental impacts. The second are actions where a tribe is requesting the NIGC take some action. In cases where the tribe is requesting the NIGC take an action, the tribe will be involved in the analyses and documentation of the environmental impacts.

1.8.6 *Scoping* is a process used to determine the extent of analyses to be contained within an environmental impact statement or environmental assessment (*See* 40 CFR 1508.25). The process shall include gathering information on the range of alternatives to be studied, impacts associated with those alternatives, and information regarding the methodologies used to identify the impacts, from other Federal agencies, State/local/tribal agencies, other interested parties and the public. This definition and process does not apply to the scope (size, capacity, or scale) of the project being proposed by a Tribe.

1.9 Applicability. The provisions of this manual and the CEQ regulations apply to major Federal actions by the NIGC that may affect the quality of the human environment. These actions may be directly undertaken by the NIGC or where the NIGC has sufficient control and responsibility to condition approvals of a non-Federal entity.

As of the publication date of this procedures manual, the NIGC has identified only one type of major Federal action it undertakes that requires review under NEPA—approving third-party management contracts for the operation of gaming activity under IGRA, 25 U.S.C. 2711, and the NIGC's implementing regulations, 25 CFR part 533. Depending on the nature of the subject contract and other circumstances, approval of such management contracts may be categorically excluded from NEPA review (*See* chapter 3); it may require the preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) (*See* chapter 4); or it may require the preparation of an Environmental Impact Statement (EIS) and Record of Decision (ROD) (*See* chapter 5). In any case, the proponents of the management contract will be expected to assist the NIGC develop the required NEPA documentation, primarily by paying for environmental consultants to gather information and prepare the required documentation. The procedures in this manual shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date, except that this manual does not apply to decisions made and draft or final environmental documents issued prior to the effective date of this manual.

1.10 Section Reserved

Chapter 2: The NEPA Process

2.1 Introduction. This chapter will provide guidance to the responsible NIGC official (NEPA Compliance Officer), approving official (NIGC Chairman), and other NIGC decision makers in the NEPA process.

2.2 The relationship between the NIGC and NEPA. It is the responsibility of the NIGC to regulate Indian gaming in accordance with the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701–2721. It is important that the NIGC comply with NEPA and other environmental laws/regulations/orders during its administration of these responsibilities. Compliance with NEPA and other environmental laws/regulations/orders will ensure that the NIGC makes informed decisions prior to taking an action. It also goes to the furtherance of the NIGC's policies outlined in chapter 1.

2.3 *Application of NEPA to NIGC decisions/actions*. In accordance with NEPA, environmental issues shall be identified and considered early in the process for reviewing a proposed management contract or other applicable action. The NIGC shall use a systematic, interdisciplinary approach. As appropriate, NIGC shall also involve local communities and coordinate with agencies and governmental organizations. Environmental permits and other forms of approval, concurrence, or consultation may be required, often from other agencies.

Awareness of any applicable permit application and other review process requirements should be included in the planning process to ensure that necessary information is collected and provided to the permitting or reviewing agencies in a timely manner. This is especially true if applicable laws, regulations, or executive orders specify timeframes for these processes. Tribes/contractors or consultants should prepare a list noting all obvious environmental resources the Tribe's proposed action and alternatives would affect, including specially protected resources. Tribes/contractors or consultants should complete these tasks at the earliest possible time during project planning to ensure full consideration of all environmental resources and facilitate NIGC's NEPA process.

2.4 Levels of NEPA Review

2.4.1 There are three (3) levels of NEPA review. The level of NEPA review will be dependent on the type and potential impacts of the action being taken. The types of actions taken by the NIGC will be:

2.4.1.1 An action that ''normally requires an environmental impact statement [EIS]'' (40 CFR 1501.4(a)(1));

2.4.1.1.1 An EIS is required when an Environmental Assessment (EA) has been done for a proposed action and the impacts of that action will exceed the applicable threshold of significance for any resource category and those impacts cannot be mitigated to a level below the threshold of significance. The threshold of significance for any resource category must be clearly identified within the EA. If the NIGC anticipates that significant impacts will result from a proposed action, it can elect to prepare an EIS without first developing an EA. The NIGC may issue its Record of Decision (ROD) 30 days following the EPA's publication in the **Federal Register** of the NOA of the Final EIS. The ROD represents the agency's official decision on the proposed action. The ROD must include all appropriate mitigation measures, as discussed in the Final EIS. (*See* also Section 5.12 of this manual).

2.4.1.2 An action that is subject to NEPA but does not qualify for a CATEX (*See* Chapter 3) or warrant the preparation of an EIS requires the preparation of an Environmental Assessment (EA).

2.4.1.2.1 An EA is not required if the NIGC has elected to prepare an EIS on the proposed action. An EA is appropriate when the NIGC believes that impacts of the proposed action will not result in impacts that meet or exceed the threshold of significance for any impacted resource category. When an EA is prepared and it is determined that the proposed action's impacts will not exceed the threshold of significance, the responsible NIGC official will prepare a Finding Of No Significant Impact (FONSI) to be issued by the NIGC Chairman. The FONSI must include all mitigation measures identified in the EA and required to avoid, eliminate, or reduce the impacts of the proposed action. The FONSI is the official NIGC determination that the proposed action will not result in any significant impacts to the human environment. It does not represent the agency's decision to implement or approve the proposed action.

2.4.1.3 An action that ''normally does not require either an environmental impact statement or an environmental assessment is categorically excluded'' (40 CFR 1501.4(a)(2));

2.4.1.3.1 A categorical exclusion (CATEX) identifies a group of actions that typically will not have a significant individual or cumulative impact on the human environment. Unless the proposed action involves an extraordinary circumstance (*See* Section 2.1.3.1.4 of this manual), an EIS or EA is not required.

2.4.1.3.2 An action that is typically categorically excluded may or may not have to be documented. The NIGC has determined which types of CATEX actions will be documented and which will not (*See* Chapter 3).

2.5 Activities Not Subject to NEPA

2.5.1 There are some NIGC activities that for NEPA purposes do not meet the traditional meaning of ''Federal actions'' and therefore are not subject to NEPA review:

2.5.2 *Advisory Actions:* When the NIGC takes an action that is advisory in nature, the requirement to comply with NEPA does not apply. As a result, a CATEX, EA or EIS is not required. However, if the NIGC knows or anticipates that a subsequent Federal action that is subject to NEPA might occur, it must point that fact out in the advisory action. The following are typical actions taken by the NIGC that are advisory in nature:

2.5.2.1 NIGC's Office of General Counsel issuance of Indian Lands opinions;

2.5.2.2 NIGC's Office of General Counsel issuance of game classification opinions;

2.5.2.3 NIGC's Office of General Counsel issuance of advisory opinions regarding whether a contract is a management contract requiring the NIGC Chairman's approval or violates IGRA's sole proprietary interest requirement.

2.5.3 *Enforcement Actions:* The following NIGC actions are administrative enforcement actions that are not considered to be ''Federal actions'' and are not subject to review under NEPA (40 CFR 1508.18(a)). As a result, a CATEX, EA or EIS is not required.

2.5.3.1 Issuance of orders of temporary closure of gaming activities as provided in § 2713(b) of IGRA;

2.5.3.2 Levying and collecting civil fines as provided in § 2713(a) of IGRA;

2.5.3.3 Making permanent a temporary order of the NIGC Chairman closing a gaming activity as provided in § 2713(b)(2) of IGRA;

2.5.3.4 Issuance of subpoenas pursuant to an enforcement action as authorized in § 2715 of IGRA;

2.5.3.5 Holding such hearings, sit and act at such times and places, take such testimony, receive such evidence, and render such decisions as the Commission deems appropriate, when done pursuant to an enforcement action, as authorized in § 2706(b)(8) of IGRA;

2.5.3.6 Administering oaths or affirmations to witnesses appearing before the Commission, when done pursuant to an enforcement action, as authorized in § 2706(b)(9) of IGRA;

2.5.3.7 Issuance of warning letters, notices of violation, civil fine assessments, closure orders, or any other action consistent with the Commission's authority to enforce IGRA, the NIGCs regulations, and approved Tribal gaming ordinances.

2.5.4 *Emergency Actions:* In the event of an emergency situation, the NIGC may be required to take an action to prevent or reduce the risk to the environment, public health, or safety that may impact the human environment without evaluating those impacts under NEPA. Upon learning of the emergency situation, the NIGC NEPA Compliance Officer will immediately inform CEQ of the emergency situation when the proposed NIGC action is expected to result in significant impacts on the human environment. In some cases, the emergency action may be covered by an existing NEPA analysis or an exemption. In other cases, it may not be covered. In these cases, the NIGC NEPA Compliance Officer (in consultation with CEQ) will obtain guidance on NEPA compliance. The NIGC NEPA Compliance Officer will provide continued follow-up consultation with CEQ throughout the duration of the emergency situation. The provisions of this section do not apply to actions

taken after the emergency situation has been resolved or those related to recovery operations.

In cases where the NIGC proposed action is not expected to result in significant impacts on the human environment, the NIGC NEPA Compliance Officer shall ensure the appropriate NEPA documentation (CATEX or EA) is prepared following the actions required to control the emergency and before any follow-up actions are taken.

2.5.5 *Statutory Conflict:* In some cases, the NIGC's statutory requirements are inconsistent with NEPA. The following NIGC action(s) have been determined to fit into this category:

2.5.5.1 Approval of Tribal gaming ordinances or resolutions as provided in § 2710 of the IGRA, which must be completed within ninety (90) days of submission to the NIGC.

2.6 Early Application of NEPA

2.6.1 Before a Tribe submits a proposed action to the NIGC, it should consult with the NIGC's NEPA Compliance Officer at 1441 L Street, NW., Washington, DC 20005 or (202) 632–7003. The Tribe should notify the NEPA Compliance Officer as early in the Tribal planning process as possible. The NEPA Compliance Officer will assist the Tribe by identifying the studies and information required for the NIGC action and initiating consultation with Federal, State, and local agencies and other Tribal governments, if necessary. The consultation should informally present the proposed action as the Tribe has planned it. The NEPA Compliance Officer will then assist the Tribe to identify the action's potential environmental impacts. This will help ensure that there will be an evaluation of a suitable range of alternatives. It will also allow the NIGC to ensure that the appropriate level NEPA review has been selected.

2.6.2 Early consultation with the NIGC's NEPA Compliance Officer and the *Cooperating Agency* environmental personnel will help determine which agency will be ''Lead Federal Agency.''

2.6.3 Consultation with other Federal, Tribal, State and local agencies will ensure the analysis of environmental impacts for individual resource categories is sufficient for approval, concurrence, or permitting by another agency.

2.6.4 Early and frequent involvement of the public will ensure the public is provided with the most accurate information regarding the proposed action and meets the NEPA policy to ''Encourage and facilitate public involvement in decisions which affect the quality of the human environment'' (40 CFR 1500.2(d)).

2.7 Responsibilities

2.7.1 NIGC Responsibilities

2.7.1.1 *NIGC Chairman (Chairman):* The Chairman shall approve and sign all NEPA decision documents (FONSI, ROD).

2.7.1.2 *NIGC Director of Contracts (Director):* The Director will supervise the day-to-day activities of the NEPA Compliance Officer. The Director will ensure that all matters raised by the NEPA Compliance Officer will get the attention due from the appropriate NIGC personnel.

2.7.1.3 *NIGC NEPA Compliance Officer (Officer):* The Officer shall be responsible for providing the NIGC with the most up-to-date environmental information that could affect NIGC actions. The Officer shall develop and propose NIGC policy as it relates to NEPA. The Officer will be responsible for the technical review of all CATEX documentation, EAs and EISs. The Officer shall consult and work with Tribes requesting an NIGC action to prepare and develop the appropriate NEPA documentation (a CATEX or an EA). The Officer shall independently review and evaluate the CATEX or Draft/Final EA to ensure the NIGC's decision is made objectively and no conflict of interest exists. The Officer will then make recommendations regarding the decision to prepare an EIS. When an EIS is required, the Officer shall review the qualifications and select the third-party contractor. The Officer will be the NIGC's Project Manager and direct all work being done for inclusion in the EIS. The Officer will prepare or have prepared NEPA decision documents (FONSIs or RODs) for proposed actions. The Officer may also be referred to in this manual as the ''responsible NIGC official.''

2.7.1.4 *NIGC Office of General Counsel (OGC):* The OGC shall be responsible for reviewing all EISs and providing a determination regarding the EISs' legal sufficiency. The OGC shall be consulted on legal matters that arise during the preparation of any NEPA compliance document.

2.7.2 *Lead/Cooperating Agencies responsibilities:* The roles of lead and cooperating agencies can be found in CEQ regulations § 1501.5 through § 1501.6. In addition to the rights and responsibilities found in the CEQ regulations, a Memorandum of Understanding (MOU) should be executed to document each agency's rights and responsibilities that are specific to a particular proposed action. When other Federal, Tribal, State and local agencies/organizations request cooperating agency status, the NIGC's decision regarding their status should be documented by entering into a Memorandum of Understanding (MOU) (*See* Appendix B).

2.7.3 *Tribal responsibilities:* The Tribe, after consultation with the NIGC NEPA Compliance Officer, shall be responsible for assisting in the preparation of the CATEX or EA documentation for its proposed action. The Tribe is also responsible for correcting deficiencies in the documentation to the satisfaction of the NIGC. During the preparation of an EIS, the Tribe's role will be limited to providing planning information and other environmental information, as appropriate. The Tribe or its proposed management contractor also will be responsible for funding the preparation of the appropriate NEPA documentation (*See* Section 2.7.6).

2.7.4 *Contractors/Consultants (Consultants) responsibilities:* Consultants that prepare NEPA review documents for the NIGC or for a non-NIGC party seeking NIGC approval must comply with this manual. Consultants preparing EISs are required to sign a disclosure statement in accordance with 40 CFR 1506.5(c). Consultants shall keep and maintain an administrative record for all EA/EIS(s) prepared for proposed NIGC action(s).

2.7.5 *Public involvement:* NEPA is a process that requires public involvement. It not only requires an agency to consider environmental information when it makes a decision, but also requires that the agency consider the public's views concerning that environmental information. At appropriate times in the NEPA process, the NIGC and Tribe shall take necessary steps to ensure the public is made aware of the environmental information concerning a proposed action and will be given an opportunity to provide their views to the NIGC. In addition, the NIGC shall ensure the public is provided an opportunity to participate before the NIGC makes substantial changes to this manual.

2.7.5.1 The NIGC or Tribe should involve the public early in the NEPA process. In most cases, the public's first involvement will be during scoping. The extent to which the public is involved in scoping will be dependent on the complexity and context of the proposed action.

2.7.5.2 The public must also be involved during the draft and final EA/EIS stages. The public must be given an opportunity to review and provide comments on the NEPA document.

Comments received on a draft EIS and the NIGC's responses will be contained in an appendix to the final document. Final EAs should document that public comments on the draft were considered before the final EA was published.

2.7.5.3 When possible, the public process used to satisfy NEPA should also be used to meet the other statutory requirements that require public involvement (*e.g.,* Section 106 of the National Historic Preservation Act, Executive Order 12898, *etc.*).

2.7.6 *Funding responsibilities:* When a Tribe requests NIGC approval of a management contract, the Tribe or its proposed management contractor will be responsible for funding the preparation of the appropriate NEPA documentation, as determined by the NIGC. If the NIGC is proposing an action subject to NEPA compliance, the NIGC will be responsible for funding the preparation of the appropriate NEPA documentation. When an EIS is required, the NIGC must maintain the authority to direct the work of the environmental contractor/consultant hired to prepare the EIS, even if a Tribe or management company is paying for the environmental contractor's services (*See* Sections 2.7.1.3 and 5.2).

2.8 Public Hearings, Workshops and Meetings

2.8.1 The environmental information presented to the public can occur in one or more types of forums (*e.g.* a public hearing, workshop or meeting) and will greatly contribute to the success of the NEPA process. In determining which is the appropriate forum to disclose environmental information about the proposed project, the complexity and potential magnitude of environmental impacts must be considered. Also consider the degree of interest that is exhibited by other Federal, Tribal, State and local authorities and the public.

2.8.1.1 When the NIGC plans to hold a public hearing, workshop or meeting for the purposes of obtaining public comments on a draft EA or EIS, the draft document should be available to the public for at least 15 days before the hearing/workshop/meeting occurs. A public announcement regarding the hearing/workshop/meeting on a draft NEPA document should appear in local newspapers that have general circulation. For a draft EIS, a Notice of Availability (NOA) will also be published in the **Federal Register** by EPA. The content of notices announcing a hearing, workshop or meeting will vary depending on the type of NEPA document being prepared. *See* sections 4 and 5 of this manual for content of notices announcing a draft, final EA and/or FONSI or a draft, final EIS and/or ROD, respectively.

2.9 Plain Language and Geographic Information

2.9.1 Information contained in a NEPA document prepared in accordance with this manual must be disclosed in a manner in which the public will be able to participate in the NEPA process. The written language within a NEPA document shall comply with 40 CFR 1502.9. In addition, preparation of NEPA documents by or for the NIGC must comply with Executive Order 12906, Coordinating Geographic Data Acquisition and Access.

2.10 Reducing Paperwork

2.10.1 CEQ regulation 40 CFR 1500.4 encourages the reduction of paperwork. Without compromising the administrative record for a proposed action, the NIGC should, to the greatest extent possible, combine NEPA requirements with other applicable environmental laws and regulations. The NIGC will also have joint documents prepared whenever possible. In addition, information may be incorporated by reference when appropriate.

2.11 Reducing Delay

2.11.1 CEQ regulations require agencies to reduce delay (*See* 40 CFR 1500.5). The responsible NIGC official shall reduce delay by doing the following:

2.11.1.1 Integrating other environmental requirements (*e.g.* permitting and approvals) early in the NEPA process. In some cases, integration may require NEPA and other environmental requirements to be addressed concurrently.

2.11.1.2 Develop and maintain relationships with other Federal, Tribal, State and local agencies/organizations. As a part of maintaining a relationship, the responsible NIGC official shall ensure prompt resolution of disputes under 40 CFR 1501.5.

2.11.1.3 Ensure the Tribes and consultants develop reasonable and achievable goals and milestones as part of the NEPA process.

2.11.1.4 Use the NEPA documentation to fulfill other environmental documentation requirements.

2.12 Intergovernmental and Interagency Coordination and Consultation

The NIGC official or the Tribe, when appropriate, will consult with other Federal, Tribal, State and local agencies/organizations early and often in the NEPA process. During the NEPA process, consultation will include scoping, commenting on the environmental impacts of the proposed action, reviewing draft and final NEPA documents, providing input on the preparation of NIGC findings, and developing appropriate mitigation strategies. In addition to these agencies' input during the NEPA process, these agencies may also be consulted regarding other environmental requirements (*e.g.* permitting and approvals).

2.12.1 Tribal Consultation shall be conducted in accordance with the NIGC's Government-to-Government Tribal Consultation Policy, as may be amended.

Chapter 3: Categorical Exclusions (CATEX) and Extraordinary Circumstances

3.1 Introduction. This chapter will explain the types of NIGC actions that must comply with NEPA but are typically categorically excluded. This chapter will also discuss the circumstances in which those actions will not be categorically excluded and will require the preparation of an EA or EIS. The responsible NIGC official shall be consulted if there is a question regarding the applicability of a CATEX or possible extraordinary circumstances to a proposed action/project.

3.2 Categorical Exclusion (CATEX) Screening

The use of a CATEX can only be applied to an action if all of the following criteria are met:

3.2.1 The responsible NIGC official must determine that the NIGC action is encompassed by one of the listed CATEXs in Section 3.3 of this manual.

3.2.2 The responsible NIGC official must determine that the action has not been segmented in order for the NIGC action to meet the definition of an action that can qualify for a CATEX. Segmentation occurs when an action is broken into smaller parts in an effort to avoid properly documenting impacts associated with the complete action. Segmentation also occurs when the NIGC action is too narrowly defined and the potential impacts are minimized in order to avoid a higher level of NEPA documentation. Connected and cumulative actions must be considered (*See* 40 CFR 1508.25).

3.2.3 The responsible NIGC official must determine if the NIGC action will involve any of the extraordinary circumstances as defined in Section 3.4 of this manual.

3.3 Categorical Exclusions

In accordance with Chapter 2, Section 2.4.1.3, the NIGC, based on past experience with similar actions, has determined that the following types of actions are categorically excluded and do not require the preparation of an EA or EIS because they will not individually or cumulatively result in a significant impact on the human environment. These types of Federal actions meet the criteria established in 40 CFR 1508.4.

3.3.1 Category 1—Administrative and Routine Office Activities:

A. Normal personnel, fiscal, and administrative activities involving personnel (recruiting, hiring, detailing, processing, paying, supervising and records keeping).

B. Preparation of administrative or personnel-related studies, reports, or investigations.

C. Routine procurement of goods and services to support operations and infrastructure, including routine utility services and contracts, conducted in accordance with applicable procurement regulations, executive orders, and policies (*e.g.* Executive Order 13101).

D. Normal administrative office functions (recordkeeping; inspecting, examining, and auditing papers, books, and records; processing correspondence; developing and approving budgets; setting fee payments; responding to requests for information).

E. Routine activities and operations conducted in an existing non-historic structure that are within the scope and compatibility of the present functional use of the building, will not result in a substantial increase in waste discharge to the environment, will not result in substantially different waste discharges from current or previous activities, and will not result in emissions that exceed established permit limits, if any. In these cases, a Record of Environmental Consideration (REC) documentation is required.

F. NIGC training in classrooms, meeting rooms, gaming facilities, or via the Internet.

3.3.2 Category 2—Regulation, Monitoring and Oversight of Indian Gaming Activities:

A. Promulgation or publication of regulations, procedures, manuals, and guidance documents.

B. Support of compliance and enforcement functions by conducting compliance training for Tribal gaming regulators and managers in classrooms, meeting rooms, gaming facilities, or via the Internet.

C. Preparing and issuing subpoenas, holding hearings, and taking depositions for informational gathering purposes, not associated with administrative enforcement actions. (**NOTE:** Activities associated with administrative enforcement actions are not subject to NEPA review, *See* Section 2.5.3 of this manual.)

3.3.3 Category 3—Management Contract and Agreement Review Activities:

A. Approval of management contracts and collateral agreements (*e.g.* development, construction, or financial agreements) or management contract amendments that meet the following criteria: (1) Involve no physical construction, other than interior renovations and minor exterior work on or in structures that are not listed or eligible for listing on the National Register of Historic Places; and (2) are not associated with plans to considerably increase patronage.

B. Conducting background investigations in connection with a management contract amendment that only changes the persons or entities with a financial interest in or management responsibilities for the contract.

3.4 Extraordinary Circumstances

Some types of actions that would normally be categorically excluded may not qualify for a CATEX because an extraordinary circumstance exists (*See* 40 CFR 1508.4). The responsible NIGC official must evaluate each proposed action and use best professional judgment to determine if it meets the CATEX requirements in Section 3.2.1 and does not have any extraordinary circumstances. If the proposed action has one or more of the following conditions, extraordinary circumstances exist and the action cannot be categorically excluded:

3.4.1 There is a reasonable likelihood the proposed action/project will have a significant impact on public health or safety.

3.4.2 There is a reasonable likelihood the proposed action/project would involve effects on the environment that involve risks that are highly uncertain, unique, or are scientifically controversial.

3.4.3 There is a reasonable likelihood the proposed action/project would violate one or more Federal, Tribal, State, or local environmental laws/regulations/orders.

3.4.4 There is a reasonable likelihood the proposed action/project will have an adverse effect on a property or structure eligible for listing or listed on the National Register of Historical Places, including degradation of scientific, cultural, or historic resources protected by the National Historic Preservation Act of 1966, as amended.

3.4.5 There is a reasonable likelihood the proposed action/project will have an impact on natural, ecological, or scenic resources of Federal, Tribal, State and/or local significance. These resources include Federal or State listed endangered, threatened, or candidate species or designated or proposed critical habitat under the Endangered Species Act (ESA); resources protected by Coastal Zone Management Act (CZMA); resources protected by the Fish and Wildlife Coordination Act; prime, unique, Tribal, State or locally important farmlands; and Federal or State listed wild or scenic rivers.

3.4.6 There is a reasonable likelihood the proposed action/project will cause a division or disruption of an established community, planned development, or is inconsistent with existing community goals/plans.

3.4.7 There is a reasonable likelihood the proposed action/project will cause an increase in surface transportation congestion that will decrease the level of service below acceptable levels, as defined by the appropriate Federal, Tribal, State, or local agency with jurisdiction for that portion of the transportation system.

3.4.8 There is a reasonable likelihood the proposed action/project will impact air quality or violate Federal, Tribal, State, or local air quality standards under the Clean Air Act Amendments of 1990.

3.4.9 There is a reasonable likelihood the proposed action/project will impact water quality, sole source aquifers, public water supply systems or Tribal, State, or local water quality standards established under the Clean Water Act and the Safe Drinking Water Act.

3.4.10 There is a reasonable likelihood the proposed action/project will have effects that are likely to be highly controversial on environmental grounds.

3.5 Categorical Exclusion Documentation

3.5.1 The purpose of categorical exclusions is to reduce paperwork and delay. The NIGC is not required to repeatedly document actions that qualify for a categorical exclusion and do not involve an extraordinary circumstance (*See* 40 CFR 1500.4(p)). This also allows NIGC environmental resources to focus on proposed actions that require an EA or EIS.

3.5.2 In some cases, the NIGC will document its decision to treat a particular action as categorically

excluded from further NEPA review. In those cases, a Record of Environmental Consideration (REC) will include:

- A complete description of the proposed action/project.
- The CATEX relied upon, including a brief discussion of why there are no extraordinary circumstances.
- Supplemental documentation that supports the conclusions in the narrative. Examples include exhibit(s) showing boundaries of historical or archeological site(s) previously identified near the proposed project, documentation from the U.S. Fish and Wildlife Service noting that no endangered species or habitat is present near the proposed project, evidence that the proposed project site is located outside any non-attainment area(s), *etc.* In some cases, a ''no effect'' determination from the SHPO/THPO may be required.
- The following statement: *I certify that, to the best of my knowledge, the information provided is the best available information and is accurate.*
- A signature from an environmental professional with a signature block that includes the professional's credentials.

Chapter 4: Environmental Assessments (EA) and Findings of No Significant Impacts (FONSI)

This chapter will provide information regarding the preparation of an EA and FONSI. The EA must provide all pertinent information to aid the NIGC in its decision-making process. If the information contained in the EA demonstrates that the proposed action will not have significant impact on the human environment, the NIGC can then issue such a finding of no significant impact, otherwise known as a FONSI.

4.1 When to prepare an EA. An EA will be prepared when a proposed action meets the following conditions:

4.1.1 The proposed action is not categorically excluded in accordance with Chapter 3;

4.1.2 The proposed action is normally categorically excluded, but extraordinary circumstances exist in accordance with Chapter 3; or

4.1.3 The proposed action is not one that requires the preparation of an EIS in accordance with Chapter 5;

4.2 Proposed action not causing a significant environmental impact. When the NIGC, upon reviewing the EA, has determined that the proposed action will not cause a significant environmental impact, the NIGC NEPA Compliance Officer will prepare or have prepared a Finding of No Significant Impact (FONSI) for review and signature by the NIGC Chairman.

4.3 Proposed action causing a significant environmental impact. When the NIGC, upon reviewing the EA, has determined that the proposed action will cause a significant environmental impact, and mitigation measures will not reduce the impact below the appropriate threshold of significance, the NIGC NEPA Compliance Officer will prepare and issue a Notice of Intent (NOI) to prepare an EIS (*See* Chapter 5). If it is anticipated that the proposed project will result in a significant environmental impact that cannot be mitigated, the NIGC can decide to prepare an EIS without first developing an EA.

4.4 Content of an EA

4.4.1 Any EA prepared for the NIGC must contain a brief discussion of the proposed action, the need for the proposed action, a range of reasonable alternatives (as required by Section 102(2)(E) of NEPA), the environmental impacts of the proposed action and alternatives, a list of alternatives eliminated from further analysis with an explanation of why they were eliminated, mitigation measures needed to reduce environmental impacts to below the level of significance, and a list of the agencies and persons consulted.

4.4.2 The level of detail and depth of impact analysis should normally be limited to the minimum needed to determine whether the proposed action or alternatives retained for further analysis would result in any significant environmental impacts.

4.4.3 The EA will contain objective analyses to support its environmental impact conclusions. The EA must not draw any conclusions regarding the decision to prepare an EIS. The decision whether to prepare an EIS will be made by the responsible NIGC official and documented in either an NOI or a FONSI.

4.4.4 Previous NEPA analyses should be used in a tiered analysis or transferred and used in a subsequent analysis to enhance the content of an EA whenever possible. The use of previous NEPA analyses can be incorporated by reference or may be adopted, as per Section 4.7 of this manual.

4.5 Actions normally requiring an Environmental Assessment (EA). The following are examples of actions that normally will require the preparation of an EA. When a proposed project involves multiple actions by the NIGC, Cooperating Agency and/or other Federal agencies, the overall significance of these actions, when viewed together, governs whether an EA or an EIS is required. Consultation with the other agencies or organizations may be required to ensure all Federal actions are adequately covered by the NEPA document prepared.

4.5.1 Approval of a new management contract, or a modification of an existing management contract that involves, either directly or through a collateral agreement, development of a new Indian gaming facility, and after a preliminary review, the potential environmental impacts are not expected to exceed, or can be mitigated to a level below, the appropriate level(s) of significance.

4.5.2 Approval of a new management contract, or a modification of an existing management contract, that involves, either directly or through a collateral agreement, a physical expansion of an existing facility, and after a preliminary review, the potential environmental impacts are not expected to exceed, or can be mitigated to a level below, the appropriate level(s) of significance.

4.5.3 Approval of a new management contract, or a modification of an existing management contract, that does not involve a physical expansion of the facility, but where the management contractor plans to considerably increase patronage, and after a preliminary review, the potential environmental impacts of the increased patronage are not expected to exceed, or can be mitigated to a level below, the appropriate level(s) of significance.

4.6 Time limits for EAs. The information contained in an EA is only valid for a finite period of time. This section will outline when an EA's information must be updated.

4.6.1 A draft EA is normally valid for a period of three (3) years unless there are substantial changes in the proposed action or there are significant new circumstances or information relevant to environmental concerns regarding the proposed action or its impacts. In cases where there is significant new circumstances or information, a written re-evaluation must be undertaken. (*See* Section 4.15). If the NIGC has not issued a FONSI within three (3) years of receipt of the Final EA, a written re-evaluation (*See* Section 4.15) must be prepared and submitted to the responsible NIGC official for consideration and determination if the alternatives, impacts, existing environment, and mitigation measures in the EA remain applicable, accurate, and valid. If there has been a significant change in these factors from that which was originally considered in the EA, a supplement to the EA (*See* Section 4.16) or a new EA

must be prepared in accordance with the procedures of this chapter.

4.6.2 For EAs where the NIGC has approved and issued a FONSI, the EA's information must be reviewed and updated when the following conditions have been established:

4.6.2.1 If major steps toward implementation of the project (such as the start of construction, substantial acquisition, or relocation activities) have not commenced within three (3) years from the date of issuance of the FONSI, a written re-evaluation (*See* Section 4.15) of the continued adequacy, accuracy, and validity of the EA will be prepared and submitted to the responsible NIGC official. If there have been significant changes in the project, the affected environment, anticipated environmental impacts, or proposed mitigation measures, as appropriate, a new or supplemental EA (*See* Section 4.16) will be required.

4.6.2.2 If the proposed project is to be implemented in stages or requires successive Federal approvals, a written re-evaluation (*See* Section 4.15) of the adequacy, accuracy, and validity of the EA will be made at major approval points that occur more than three (3) years after issuance of the FONSI, and a new or supplemental EA may be required.

4.7 Adoption. In some cases, the NIGC may adopt, in whole or in part, a draft or final EA or the EA portion of an EA/FONSI prepared for another Federal, Tribal, State or local agency/organization if it meets the requirements of this chapter. As part of the adoption process:

4.7.1 Prior to adoption of another agency/organization's EA, the NIGC must complete an independent evaluation of the information contained in the EA, take full responsibility for scope and content that addresses NIGC actions, and issue its own FONSI. If the EA is found to comply with this chapter and relevant provisions of CEQ regulations, the responsible NIGC official will recommend adoption and signature to the NIGC Chairman.

4.7.2 When appropriate and efficient, the responsible NIGC official may augment such an EA when it is essentially, but not entirely, in compliance with this chapter and/or relevant provisions of CEQ regulations, in order to make it compliant.

4.7.3 Adoption or augmentation of an EA shall receive the same public participation that the EA would have received if it had originated with the NIGC.

4.7.4 If the NIGC decides to adopt, in whole or in part, a draft or final EA or the EA portion of an EA/FONSI prepared for another Federal, Tribal, State or local agency/organization, the time requirements established in Section 4.6 shall apply.

4.8 Impact Categories. Appendix A of this manual identifies resource categories that the NIGC examines for its actions under NEPA. It should be noted that the list of resource categories in Appendix A is not exhaustive. In some circumstances, additional resource categories may need to be added. It is recommended that prior to conducting analysis under any of these categories, the responsible NIGC official be consulted regarding methodologies, thresholds of significance, mitigation measures, and permitting.

4.9 Environmental Assessment (EA) Process. This section shall apply when the responsible NIGC official has determined that the proposed action cannot be categorically excluded and the anticipated environmental impacts do not warrant preparation of an EIS.

4.9.1 The EA process begins with the responsible NIGC official or Tribe requesting an NIGC action, gathering background data, and coordinating/consulting with other agencies. This information will be used to formulate the proposed action and reasonable alternatives to achieve the project's purpose and need.

4.9.2 If a Tribe is proposing an action, the Tribe will draft a purpose and need statement for the proposed project and the responsible NIGC official will determine its adequacy. If the NIGC is proposing an action, the responsible NIGC official will develop a purpose and need statement for the proposed project.

4.9.3 While not required by CEQ regulations, the responsible NIGC official and Tribe proposing the action may elect to initiate scoping. If it is determined to conduct scoping, the public will be notified of how they can participate in the scoping process.

4.9.4 The responsible NIGC official or Tribe proposing the action will have the EA document prepared with a level of analysis sufficient to:

4.9.4.1 Understand the purpose and need for the proposed action, identify a range of reasonable alternatives (including the no-action alternative), and assess potential environmental impacts.

4.9.4.2 Determine if potential environmental impacts are significant enough to require the preparation of an EIS or if a FONSI can be issued.

4.9.4.3 Identify any permits, licenses, other approvals, or reviews that apply to the proposed action.

4.9.4.4 Identify agencies, including cooperating agencies, consulted or to be consulted.

4.9.4.5 Identify all public involvement activities (*e.g.* scoping or public workshops).

FIGURE 4–1—ENVIRONMENTAL ASSESSMENT PROCESS FOR AN NIGC ACTION

Step 1	• The responsible NIGC official or Tribe proposing the action formulates the proposed action and a range of reasonable alternatives, in accordance with Section 102(2)(E) of NEPA, to achieve the project's purpose and need.
Step 2	• Responsible NIGC official or Tribe proposing the action collects background data.
Step 3	• Responsible NIGC official determines the need for an EA.
Step 4	• Initiate scoping, if appropriate, and determine issues and alternatives to be addressed.
Step 5	• Prepare preliminary draft EA.
Step 6	• Responsible NIGC official and other cooperating agencies review preliminary draft EA.
Step 7	• Prepare a revised draft EA in accordance with appropriate comments from the responsible NIGC official and other cooperating agencies.
Step 8	• Circulate the revised draft EA to the public and other Federal, Tribal, State and local agencies/organizations for comment.
Step 9	• Prepare final EA based on comments received.
Step 10	• Responsible NIGC official determines significance of impacts.
Step 10a	• If impacts are NOT significant, responsible NIGC official prepares or has prepared a FONSI for the NIGC Chairman's review and decision.
Step 10b	• If impacts ARE significant, responsible NIGC official proceeds with an EIS (*See* Chapter 5). Do not go to Step 11.
Step 11	• Publish the final EA and FONSI.
Step 12	• NIGC proceeds with action, and if applicable, mitigation and monitoring.

4.9.5 The EA should present detailed analysis, commensurate with the level of impact of the proposed action and alternatives, to determine whether any impacts will be significant. If the proposed action and its alternatives will not cause significant impacts within the applicable resource categories (*See* Appendix A), a brief statement describing the factual basis for the conclusion that the action is not likely to cause significant environmental impacts is sufficient. If the NIGC or Tribe has experience with an environmental management system (EMS) that includes monitoring of the implementation of actions similar to the proposed action and alternatives, the EMS may provide a factual basis for an assessment of the potential impacts.

4.9.6 To ensure that the EA is concise and clear about the basis for its conclusions, the NIGC may incorporate by reference other documents and analyses. Referenced material must be reasonably available to the public, either in existing NEPA documents or in general background information, documents or studies prepared for other purposes.

4.9.7 Internal review of a preliminary draft EA is conducted by the NIGC NEPA Compliance Officer, any cooperating agency's NEPA points of contact, and the Tribe proposing the action. The NEPA Compliance Officer is responsible for reviewing the EA and ensuring technical requirements have been meet. Cooperating agency NEPA points of contact are responsible for ensuring the EA meets their agency's NEPA requirements. The Tribe shall review the EA to ensure it fully encompasses the project that it has proposed and that the Tribe is prepared to undertake all proposed mitigation measures. Upon completion of the internal review, the NIGC NEPA Compliance Officer will consolidate comments and forward them to the Tribe or the consultant with instructions to revise the EA.

4.9.8 Following the internal review, preparation of the EA should be coordinated with other agencies when the action involves resources protected by special purpose laws or administrative directives. Those agencies that have special expertise should also be consulted, as necessary. Examples of special purpose laws or directives include, but are not limited to, actions involving: Section 404 of the Clean Water Act; Section 106 of the National Historic Preservation Act; Section 7 of the Endangered Species Act; and Section 307 of the Coastal Zone Management Act. Examples of agencies with special expertise include, but are not limited to, the Federal Highway Administration, State transportation authorities, and local planning agencies with expertise in developing and building roads.

4.9.9 The public, other Federal, Tribal, and State agencies, and other government entities shall be given an opportunity to review and comment on the draft EA. The review and comment period for the draft EA shall not be less than 30 days. During the comment period, it is recommended that a public meeting/workshop be held, no sooner than fifteen (15) days following the draft EA being circulated, to further explain the methodologies used in the analysis and conclusions reached in the document. Notice of the meeting/workshop must be published in a local newspaper with general circulation. At a minimum, the notice must contain the following information: (1) Date, time, place, and time period during which written comments will be accepted; (2) Description of the proposed action/project; (3) Location(s) where the document can be reviewed; (4) Contact information of the responsible NIGC official (NEPA Compliance Officer). Upon receipt of comments, the responsible NIGC official will determine whether the analyses used to evaluate the impacts on each environmental resource category in the EA are sufficient, or if additional environmental analysis is needed, and will have the final EA prepared accordingly.

4.9.10 The final EA and FONSI will then be made available to the public, and Federal, Tribal, State and local agencies/organizations. This availability period shall not be less than 30 days. Notice of the final EA and FONSI's availability shall at a minimum be published via local media (*e.g.* local newspapers), but may in some cases be published in the **Federal Register.** The decision to publish the notice in the **Federal Register** is at the discretion of the NIGC.

FIGURE 4–2—ENVIRONMENTAL ASSESSMENT CONTENT

Purpose	Assist agency planning and decision-making by summarizing environmental impacts to determine need for: • An EIS. • Mitigation Measures.
Scope	Addresses the proposed action's and reasonable alternatives' impacts on the affected environmental resources.
Content	Describes and identifies: • Purpose and need for the proposed action/project. • Proposed action/project. • Range of reasonable alternatives considered (including a no-action alternative), in accordance with Section 102(2)(E) of NEPA. • Affected environment (existing conditions). • Environmental impacts of the proposed action and alternatives. • Mitigation measures (if necessary). • Federal, Tribal, State and local agency/organizations consulted.
Public Participation	Provide opportunities for public participation to the extent practicable.

4.10 Preferred Environmental Assessment Format. This section will provide information regarding the NIGC's preferred EA format. While CEQ does not specify what format should be used for an EA, use of the following format will aid the NIGC in its review of the EA and ensure integrated compliance with other environmental laws, regulations, and applicable Executive Orders with NEPA review. All preliminary, draft, and final EAs shall be submitted to the NIGC in both hardcopy and digital (*e.g.*, compact disc) form.

4.10.1 *Cover Page:* The cover should be clearly label ''Environmental Assessment.'' It should also identify, where applicable, the subject Tribe, the name of the subject gaming facility, the location of the proposed project, all cooperating agencies, and the consultant, if one is preparing the EA. When an EA is prepared by a consultant, the cover page should also include ''This Environmental Assessment becomes a Federal document when evaluated and signed/dated by the responsible NIGC official.''

4.10.2 *Proposed Action/Project:* The beginning of the document should briefly describe the proposed Tribal project (*e.g.,* construction and management/operation of a gaming facility) and the proposed Federal action (*e.g.,* approval of a management contract between ABC and XYZ). It should contain enough information so as to be understandable to individuals who are not familiar with the proposed action/project.

4.10.3 *Purpose and Need:* This section should clearly identify the problem facing the Tribe proposing the action (that is, what is the need for the proposed action/project), the purpose of the action/project (that is, how will the proposed action/project solve the problem of Tribe). A timeframe for implementation of the proposed action/project should also be included, if known. The purpose and need for the proposed action should be justified and defined in terms that are understandable to individuals who are not familiar with needs of Native American Tribes. Any references to supporting data, studies, or other analyses can be incorporated by reference, so long as they meet the requirements established in Section 4.9.6.

4.10.4 *Alternatives:* The alternatives evaluated in the EA are those that will be considered by the NIGC approving official. The alternatives have to provide the NIGC approving official sufficient information to make a reasoned decision. At a minimum, the alternatives section should contain the following:

4.10.4.1 A list of all alternatives considered, including the proposed action, the no-action alternative, other reasonable alternatives, and alternatives that were considered but not retained for further evaluation. For each alternative evaluated, any connected actions or cumulative impacts should be considered. The number of reasonable alternatives evaluated will be determined by the number of alternatives that can meet the purpose and need statement for the project and Section 102(2)(E) of NEPA.

4.10.4.2 A statement identifying the Tribe's preferred alternative, and the NIGC's preferred alternative (if one has been identified).

4.10.4.3 A statement explaining why any alternatives were considered and eliminated from further study. Alternatives that were considered but not fully evaluated are those alternatives that either do not meet the purpose and need or are unreasonable from an implementation stand-point. Examples of alternatives that are unreasonable from an implementation stand-point include, but are not limited to, those for which construction costs are unreasonable, proposals on lands that do not, and cannot reasonably be made to, qualify for Indian gaming, and those for which preliminary environmental screening has identified an insurmountable barrier (*e.g.* Corps of Engineers' unwillingness to issue a Clean Water Act § 404 permit). Discussions of these alternatives should articulate why each alternative was considered and eliminated from further analysis.

4.10.4.4 If appropriate to aid understanding, a visual depiction (using photos, Geographic Information System (GIS), other sources) of each alternative evaluated. This should include, but is not limited to, aerial photos and/or maps showing project locations, GIS figures showing detailed information, and Computer Aided Design and Drafting (CADD) depictions showing project site layouts.

4.10.5 *Affected Environment:* The ''Affected Environment'' section should succinctly describe the existing environmental conditions of the potentially affected geographic areas. The geographic areas described in this section may vary depending on the anticipated impacts (*e.g.* the socioeconomic geographic area may be larger than the geographic area described for noise impacts). The descriptions provided in this section should be commensurate with the potential for impact and importance of that aspect of the environment. Where appropriate, the use of GIS and other mapping tools should be used to avoid superfluous written descriptions. Examples of items included in this section follow:

4.10.5.1 Location map, vicinity map, project layout plan, and photographs.

4.10.5.2 Existing and planned land uses and zoning, including: Descriptions of industrial and commercial growth characteristics in the affected area; affected residential areas, schools, churches, hospitals, public parks and recreational areas, wildlife/waterfowl refuges; areas with known or suspected Federal or State threatened or endangered species or critical habitat; wetlands; floodplains; farmlands; coastal zones/barriers; Federal or State wild and scenic rivers; and historic/cultural/archeological sites listed or eligible for listing on the National Register of Historic Places.

4.10.5.3 Political jurisdictions that may be affected by the proposed action.

4.10.5.4 Population estimates and other demographic information.

4.10.6 *Environmental Consequences:* The EA must evaluate the environmental consequences that will be the result of the no-action alternative, the proposed action, and any other reasonable alternatives that were retained for further analysis. The evaluation must provide enough information on and evidence of the environmental consequences for each alternative being evaluated so as to allow the NIGC to determine whether to prepare an EIS or a FONSI. The environmental consequences section must provide analysis that the NIGC determines to be sufficient to address the significance factors (*See* 40 CFR 1508.27). The analysis should focus on those resource categories that will be directly, indirectly, and cumulatively impacted by the proposed action. The EA should note any resource categories that will not be impacted by the proposed action, the no-action, and other alternatives retained for further analysis. It is appropriate to incorporate by reference background data to support the environmental consequences analysis.

4.10.6.1 The results of the analysis must include the adverse effects that cannot be avoided and mitigation measures necessary to reduce the environmental consequences to a level below the significance threshold if the proposed action is implemented. This section should not duplicate the information contained in the Alternatives section. Information in this section should contain the following for each alternative retained for further analysis:

4.10.6.1.1 Direct effects and their significance;

4.10.6.1.2 Indirect effects and their significance;

4.10.6.1.3 Cumulative effects and their significance (this analysis should evaluate the effects of the proposed action when combined with other past, present, and reasonably foreseeable actions taken by either another Federal, Tribal, State, local, or private entity. For additional information on properly analyzing the cumulative effects, refer to CEQ guidance ''Considering Cumulative Effects Under the National Environmental Policy Act,'' issued January 1997 and ''Guidance on the Consideration of Past Actions in Cumulative Effects Analysis,'' issued June 2005)

4.10.6.1.4 Any possible conflicts between the proposed action and the objectives of Federal/State/local and other Tribal plans, policies, and controls in the affected area.

4.10.6.2 The proposed action, the no-action alternative and each alternative retained for further study must be analyzed for environmental

consequences to each of the resource categories contained in Appendix A, ''Environmental Resource Categories.'' If required and as a matter of practice, the NIGC supports the issuance of permits and approvals for a proposed action with or shortly after the issuance of the Final EA and FONSI. In order to facilitate this, the responsible NIGC official may: (1) Participate in coordination efforts with other Federal, Tribal, State and/or local agencies or organizations, (2) identify information needed by other Federal, Tribal, State and/or local agencies or organizations, and (3) integrate items (1) and (2) into the EA process.

4.10.7 *Mitigation:* Any mitigation measures included in the EA must be reasonable and should contain enough detail to describe the benefits of the proposed mitigation measure. Mitigation measures should only be included after consultation with the Federal, Tribal, State or local agency or organization that has jurisdiction over the resource being impacted. Mitigation measures should be considered when they will avoid, minimize, rectify, reduce, eliminate, or compensate for significant impacts. Any proposed mitigation measure should describe how it will reduce or eliminate the impact(s) and if the resulting impacts are significant. If mitigation is proposed to reduce impacts below the appropriate level of significance, an EIS is not required, provided that:

4.10.7.1 The agency took a ''hard look'' at the environmental impacts.

4.10.7.2 The agency identified the relevant areas of environmental concern.

4.10.7.3 The EA supports the agency's determination that potential impacts are not significant.

4.10.7.4 The agency has identified mitigation measures that will be sufficient to reduce potential impacts below the threshold of significance and has obtained commitments from the Tribe to implement those measures.

4.10.8 *List of Preparers:* The EA shall contain a list of names and qualifications of personnel (NIGC, Cooperating Agency, Tribal representatives, consultants and sub-consultants) who prepared the EA. The list should include individuals responsible for analysis, review and comment, and other background information that is included or referenced.

4.10.9 *List of Agencies and Persons Consulted:* The EA shall include at a minimum those Federal, Tribal, State and local agencies and organizations with whom the consultation or coordination was done.

4.10.10 *Appendices:* The EA should include the following appendices, as appropriate:

4.10.10.1 Documentation that supports or evidences conclusions, references, and methodologies.

4.10.10.2 Documentation that supports or evidences consultation and/or coordination with Federal, Tribal, State and/or local agencies and organizations. This documentation may take the form of comments provided on the EA, letters/other correspondence, and/or meeting minutes.

4.10.10.3 Documentation that supports or evidences the public's opportunity to participate in the development of the EA. This documentation may include, but is not limited to, published notices for public hearings or workshops, transcripts of public hearings, sign-in sheets from public workshops, and comment letters received during the public's review period.

4.11 Finding of No Significant Impact (FONSI)

4.11.1 *Purpose:* The purpose of an EA is to support the NIGC's determination that the proposed action does or does not have the potential to create significant impacts. If none of the potential impacts are likely to be significant, the responsible NIGC official shall prepare or have prepared a ''finding of no significant impact'' (FONSI), which will briefly present, in writing, the reasons why the proposed action will not have a significant impact on the human environment. The NIGC Chairman shall make the final decision whether to approve the FONSI. Approval of a FONSI signifies that the NIGC will not prepare an EIS and has completed its NEPA documentation for the proposed action. Approval of a FONSI does not mean that the NIGC has decided to take the proposed Federal action. Instead, it only means that the NIGC found the proposed action, if taken, will not have a significant impact on the environment (*See* Section 4.10.6).

4.11.2 *Scope:* While there is no particular format for a FONSI, it must contain all the information noted in 40 CFR 1508.13.

4.11.2.1 The FONSI must be combined with the final EA to create a single document. The FONSI must include a brief description of the proposed action, the purpose and need, a reference to the alternatives considered, those impacts for which mitigation is proposed, and the NIGC's findings that resulted from the EA. The FONSI shall document or reference relevant material necessary to support the conclusion that the action is not a major Federal action significantly affecting the human environment.

4.11.2.2 The FONSI should determine the proposed action's consistency or inconsistency with community planning, and should document or reference the basis for the determination.

4.11.2.3 The FONSI shall present any measures required to mitigate adverse impacts on the environment and which are a condition of the decision to forego the preparation of an EIS. The FONSI should also reflect coordination of proposed mitigation commitments with, and consent and commitment from, those with the authority to implement specific mitigation measures committed to in the EA and FONSI.

4.11.2.4 The FONSI should reflect compliance with applicable environmental laws and requirements, including interagency and intergovernmental coordination and consultation, public involvement, and documentation. The FONSI should also contain findings and determinations required under special purpose environmental laws, regulations, and executive orders, if not made in the EA.

4.11.3 Internal Review Process and Approval

4.11.3.1 The responsible NIGC official will coordinate the review of the FONSI with the NIGC's Office of General Counsel. The FONSI may be reviewed by other NIGC personnel, when necessary.

4.11.3.2 Each FONSI shall include the following at the end of the document:

Recommendations/Approvals

After careful and thorough consideration of the facts contained herein, the undersigned finds that the proposed Federal action is consistent with existing national environmental policies and objectives as set forth in Section 101 of the NEPA and other applicable environmental requirements and will not significantly affect the quality of the human environment.

Environmental Assessment and FONSI reviewed and recommended by:

_____

NIGC NEPA Compliance Officer

_____

Date

Approved by:

_____

NIGC Chairman

_____

Date

4.11.4 *Agency Distribution:* A copy of the FONSI and EA shall be sent to

reviewing agencies and organizations or individuals that made substantive comments or specifically requested copies. When a project impacts a resource protected under a special purpose law or administrative directive (*e.g.* Section 7 of the Endangered Species Act), the responsible NIGC official shall send a signed copy of the FONSI and the EA supporting it to the agency(ies) with whom the NIGC consulted to comply with the applicable law or directive.

4.11.5 *Public review:* In some cases, it may be appropriate to give the public an opportunity to review the FONSI before the agency takes its action (*See* 40 CFR 1501.4(c)(2) and CEQ's ''40 Most Asked Questions,'' number 37b). When one of the following circumstances exists, the final EA/FONSI will be made available to the public for a minimum of 30 days:

4.11.5.1 The proposed action is, or is closely similar to, one normally requiring the preparation of an EIS;

4.11.5.2 The nature of the purposed action is one without precedence; or

4.11.5.3 A special purpose environmental law, regulation, or executive order requires public notice of specific findings or determinations apart from the FONSI.

4.11.6 *Internal Distribution:* The FONSI and EA shall be kept on file with the NIGC and sent to the National Records Center in accordance with the NIGC records retention policy.

4.11.7 *Public Availability:* In accordance with CEQ regulations, the NIGC shall make the FONSI available to interested or affected persons or agencies (*See* 40 CFR 1506.6). When the FONSI is made available, a notice of availability shall be made public using the appropriate method, as defined by 40 CFR 1506.6(b). The announcement will identify the location(s) where the FONSI and final EA may be reviewed. Copies of the FONSI and final EA will be provided upon request, free of charge or at a fee commensurate with the cost of reproduction.

4.12 Monitoring Mitigation

4.12.1 In accordance with 25 CFR 531.1(b)(16), a pending management contract will assign either the Tribe or casino manager the responsibility to supply the NIGC with all information necessary for the NIGC to comply with NEPA. This shall include documentation that all mitigation and other conditions established in the final EA and FONSI, or in agreements with State/local agencies or organizations, and included as a condition of the project approval, have been implemented.

4.13 Decision Documents for Findings of No Significant Impact

4.13.1 Immediately following the approval of a FONSI, except in the circumstances identified in Section 4.11.5, the NIGC decisionmaker may decide whether to take the proposed action. Mitigation measures that were made a condition of the approved FONSI and the steps taken to assure appropriate commitment and follow-up shall be incorporated in the decision to implement the action.

4.14 Programmatic Environmental Assessments

4.14.1 The concept of programmatic EISs may also be applied to EAs. The responsible NIGC official may elect to prepare a tiered document from a completed EA or EIS if the official finds that the selected EA or EIS is current and meets NIGC requirements. Permitting and review agencies may have independent requirements for review of the previously prepared documents.

4.15 Written Re-Evaluations

4.15.1 The NIGC will prepare or have prepared a written re-evaluation of an EA or EA/FONSI when there are substantial or significant new circumstances or information related to the proposed action or to the environmental concerns of the proposed action, which may have a bearing on the proposed action or its impacts. The re-evaluation will assist the responsible NIGC official in determining whether the preparation of a supplemental EA or EA/FONSI is necessary. The preparation of a supplemental EA or EA/FONSI is not necessary when it can be documented that:

4.15.1.1 The proposed action generally conforms in scope to plans or projects for which a prior FONSI has been issued;

4.15.1.2 The data and analyses contained in the previous EA and FONSI are still substantially valid and applicable; and

4.15.1.3 All material conditions and requirements of the prior approval(s) have been, or will be, met in the current action.

4.15.2 An evaluation, signed by the responsible NIGC official, or a letter documenting the evaluation, will either conclude that the contents of the previously prepared environmental document(s) remain valid or that significant changes require the preparation of a supplemental or new EA or EA/FONSI.

4.15.3 The written re-evaluation will be reviewed by the NIGC's Office of General Counsel.

4.16 Supplemental Environmental Assessments or EA/FONSIs

4.16.1 The NIGC will prepare or have prepared a supplement to an EA or EA/FONSI when there are substantial or significant new circumstances or information related to the proposed action or to the environmental concerns of the proposed action, which bear on the proposed action or its impacts. Substantial or significant new circumstances/information means information showing dramatic changes to the impacts of the proposed project compared to those identified in the original EA or FONSI. The agency may also prepare or have prepared a supplement when the purposes of NEPA will be furthered by doing so.

4.16.2 Supplemental documents will be prepared and circulated in accordance with the procedures of this chapter.

4.16.3 When a supplemental EA is prepared, a new FONSI must be issued.

4.17 Review/Comments on EAs

Federal, Tribal, State, local agencies/organizations, and the public may review and comment on a draft EA. When comments are submitted to the NIGC, they should be specific in nature and organized in a manner consistent with the structure of the draft EA and may identify modifications that might enhance environmental quality or avoid or minimize adverse environmental impacts, and will correct inaccuracies or omissions. Comments must be submitted within the time limits set forth in the request for comments, unless the commentor seeks and receives an extension from the responsible NIGC official.

4.18 Review/Comments on EAs Prepared by Other Agencies

If the NIGC is commenting as a cooperating agency, the responsible NIGC official shall specify in his or her comments whether any additional information is needed or describe the mitigation measures the NIGC considers necessary to adopt or concur with the other agency's findings.

Chapter 5: Environmental Impact Statements and Records of Decision

5.1 Introduction. The purpose of this chapter is to provide guidance on the process and preparation of an Environmental Impact Statement (EIS) and Record of Decision (ROD). The EIS shall provide environmental impact information, including required or agreed to mitigation measures, to the decisionmaker and the public. The two main differences between an EIS and an EA are the level of analysis conducted

and the formalities regarding public participation.

5.2 Roles and Responsibilities of the EIS Team. The EIS team has several key personnel. The following section will outline the roles and responsibilities of each member of the team.

5.2.1 *Lead Federal Agency:* The Lead Federal Agency for Indian gaming projects will either be the National Indian Gaming Commission (NIGC) or the Bureau of Indian Affairs (BIA). When the NIGC is the Lead Federal Agency, the NIGC shall assume the following roles and responsibilities:

5.2.1.1 Serve as the Project Manager for the preparation of the EIS and ROD;

5.2.1.2 Select an EIS consultant (*See* Appendix C);

5.2.1.3 Prepare, or direct an EIS consultant to prepare, the EIS/ROD and all supporting documents;

5.2.1.4 Consult with agencies responsible for special purpose laws or administrative directives; and

5.2.1.5 Ensure that the analysis contained in the EIS/ROD complies with NEPA.

5.2.2 *Cooperating Agency(ies):* A cooperating agency is ''any Federal agency * * * which has jurisdiction by law or special expertise with respect to any environmental impact * * *'' (40 CFR 1508.5). This definition also goes on to say that ''a State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe'' may be a cooperating agency. When cooperating agencies are identified, a Memorandum of Understanding will be prepared to outline their roles and responsibilities (*See* MOU Example in Appendix B). In addition to those roles and responsibilities, each cooperating agency shall be responsible for ensuring the content of the EIS meets its own NEPA compliance procedures.

5.2.3 *EIS Consultant:* The EIS consultant will be responsible for the preparation of the EIS. The EIS consultant will prepare the EIS at the direction of the Lead Federal Agency (for the purposes of this Manual, the NIGC).

5.2.4 *Tribe:* The individual Tribe proposing a project will be responsible for providing information and funding needed for the preparation of the EIS in accordance with Section 2.7.6. Information shall include, but is not limited to, a detailed description of the proposed project and potential alternatives to the proposed project. In addition, the Tribe should appoint a Tribal Point of Contact (POC). The POC shall serve as a liaison between the Tribe and the rest of the EIS team. When appropriate, the Tribe may also act as a Cooperating Agency.

5.3 Actions Normally Requiring an Environmental Impact Statement. An EIS is required when a major Federal action will significantly affect the quality of the human environment.

5.3.1 Significance is defined in terms of context and intensity (*See* 40 CFR 1508.27).

5.3.2 If an EA was prepared for a proposed action, and based on that analysis, it was determined that one or more of its impacts would be significant, an EIS must be prepared. The EA that was prepared should then be used in the scoping process described below.

5.3.3 If the responsible NIGC official, based on his or her professional judgment, has determined that a proposed action has the potential to cause significant impacts, he or she may elect to prepare an EIS without first preparing an EA.

5.3.4 The addition of mitigation to reduce impacts below significance may avoid the requirement to prepare an EIS. If mitigation is integrated into the design of the proposed action, or if through scoping or the EA process the proposed action is redefined to include mitigation, or if all potentially significant impacts are mitigated below the appropriate thresholds of significance, then the responsible NIGC official may rely on the mitigation measures in determining that the overall effects would not be significant and prepare an EA/FONSI. (*See* Section 4.11.5).

5.3.5 Following the preparation of an EA or if a decision has been made to prepare an EIS without first preparing an EA, an EIS must be prepared when the Federal action has the potential to cause:

5.3.5.1 A significant adverse effect on cultural or historic resources pursuant to the National Historic Preservation Act of 1966, as amended;

5.3.5.2 A significant impact on natural, ecological, or scenic resources of Federal, Tribal, State or local significance (*e.g.,* Federally listed or proposed endangered, threatened, or candidate species, or designated or proposed critical habitat); resources protected by the Fish and Wildlife Coordination Act; wetlands; floodplains; coastal zones; prime or unique State or locally important farmlands; energy supply and natural resources; or wild and scenic rivers;

5.3.5.3 A substantial division or disruption of an established community or planned development, or is likely not to be reasonably consistent with plans or goals that have been adopted by the community in which the proposed project is to be located;

5.3.5.4 A significant increase in congestion from surface transportation (by causing a decrease in the Level of Service (LOS) below acceptable levels determined by an appropriate transportation agency, such as a highway agency);

5.3.5.5 A significant increase in noise levels on noise-sensitive areas, as defined by Federal Highway Administration or State transportation department;

5.3.5.6 A significant impact on air quality or a violation of Federal, Tribal, State or local air quality standards under the Clean Air Act, as amended;

5.3.5.7 A significant impact on water quality or sole source aquifers, or contamination of a public water supply system, or a violation of State or Tribal water quality standards established under the Clean Water Act and the Safe Drinking Water Act;

5.3.5.8 A violation of any Federal, Tribal, State, or local law relating to the environmental aspects of the proposed action; or

5.3.5.9 A significant impact on the human environment, including, but not limited to, actions likely to cause a significant lighting impact on residential areas or business properties, or likely to cause a significant impact on the visual nature of surrounding land uses.

5.4 Resource Categories. Appendix A of this manual identifies the environmental resource categories that may be impacted. It should be noted that the list of resource categories in Appendix A is not exhaustive. In some circumstances, additional resource categories may need to be added. It is recommended that prior to conducting analysis under any of these categories, the responsible NIGC official be consulted regarding methodologies, thresholds of significance, mitigation measures, and permitting.

5.5 Environmental Impact Statement Process Overview. When a determination has been made to prepare an EIS, the following Figure provides an overview on the EIS process.

FIGURE 5–1—THE ENVIRONMENTAL IMPACT STATEMENT OVERVIEW

Step 1	Responsible NIGC official or applicant formulates a proposed action, purpose and need, and a range of preliminary alternatives.
Step 2	Responsible NIGC official or applicant collects background data and the responsible NIGC official analyzes the information.
Step 3	Responsible NIGC official determines the need for an EIS (anticipated significant impact).
Step 4	Notice of Intent (NOI) published in **Federal Register** and local press.
Step 5	Initiate scoping activities, inviting participation of affected agencies and interested persons to aid in determining issues and alternatives to be addressed.
Step 6	Perform the environmental analyses.
Step 7	Prepare a draft EIS.
Step 8	Circulate copies of draft EIS to the public and other Federal, Tribal, State and local agencies/organizations for review and comment.
Step 9	File draft EIS with EPA (EPA will publish a Notice of Availability (NOA)). The responsible NIGC official may choose to publish a separate NOA under the NIGC heading in the **Federal Register**.
Step 10	Provide a public comment period for the draft EIS (60 days minimum from the EPA NOA date).
Step 11	Responsible NIGC official receives and evaluates comments. Comment periods may be extended (*See* Section 5.7.1).
Step 12	Revise draft EIS after consideration of public comments.
Step 13	Make copies of final EIS available to public, to include commenters.
Step 14	File final EIS with EPA (EPA will publish an NOA). The responsible NIGC official may choose to publish a separate NOA under the NIGC heading in the **Federal Register**.
Step 15	Responsible NIGC official must wait a minimum of 30 days from the EPA NOA date to allow for review, or allow for requests of reconsideration or technical corrections.
Step 16	Responsible NIGC official prepares, or directs to be prepared, a Record of Decision (ROD).
Step 17	NIGC approving official signs the ROD, takes or approves the Federal action, and has the ROD published in accordance with Section 5.12.6 of this manual.

5.6 Additional EIS Process Information

5.6.1 *Notice of Intent and Notice of Availability:* A Notice of Intent (NOI) must be prepared when it has been determined that an EIS must be prepared. The information that must be included in an NOI can be found in Figure 5–2. If a scoping hearing or meeting is planned and sufficient information is available at the time, the NOI should also announce the hearing or meeting, including the time and place of the hearing or meeting. The scoping hearing or meeting can also be announced separately. If the scoping hearing or meeting is being used to satisfy requirements of another environmental law/regulation, or executive order in addition to NEPA, the NOI should include a statement to that effect with a reference to the specific law, regulation, or executive order. Other forms of publication (other than the **Federal Register**) shall be sought out to publish the NOI (40 CFR 1506.6).

5.6.1.1 The responsible NIGC official shall prepare the NOI in accordance with **Federal Register** *Document Drafting Handbook*. Once the NOI has been reviewed by the appropriate OGC attorney and the NIGC's Director of Contracts, three copies of the NOI will be sent to the Chairman for his signature. Upon receipt of the signed copies, the responsible NIGC official will send a cover letter, the three signed copies and a copy on a computer disc to: Director, Office of the Federal Register, National Archives & Records Administration, 800 North Capitol St., NW., Suite 700, Washington DC 20001.

5.6.1.2 While preparing the NOI for publication in the **Federal Register**, the responsible NIGC official will begin working with the consultant selected to prepare the EIS and the Tribe proposing the action to establish an interdisciplinary approach to the preparation of the EIS (*see* 40 CFR 1502.6), EIS schedule and the channels of communication necessary to manage the preparation of the EIS.

5.6.1.3 A Notice of Availability (NOA) is used to announce the availability of either the draft EIS or the final EIS. The draft or final EIS is filed with the U.S. Environmental Protection Agency (EPA) and the EPA prepares and publishes an NOA. The NIGC may publish its own NOA in the **Federal Register**, but this is not mandatory. In most cases, the NIGC will publish its own NOA when the proposed action is highly controversial on environmental grounds. For additional information, check the EPA Web site (*http://www.epa.gov/compliance/nepa/index.html*). Finally, the NOA should be published in local newspaper(s).

FIGURE 5–2—NOI

Purpose	• Notice of Intent (NOI) announces to the public that the EIS process has begun for a proposed NIGC action.

FIGURE 5–2—NOI—Continued

Content	• If appropriate, the NOI announces the availability of a scoping document (or a previously prepared EA). • The NOI announces the scoping meeting, if one is planned, to include time and place. A separate notice can be prepared if the details of the scoping meeting(s) are unknown. • NOI must be published at least 15 days in advance of the scoping meeting(s). • Proposed action and possible alternatives. • Proposed scoping process including whether, when, and where scoping meeting will be held. • Identifies the NIGC point of contact for public inquiries.
Public Participation	• The NIGC and Tribe or consultant publishes NOI in the **Federal Register** and local newspaper(s), respectively. • NOI or other notice of scoping should be published at least 15 days prior to the scoping meeting.

5.6.2 *Scoping (Also defined in Section 1.8.5):* The scoping process is used to identify the environmental issues that should be considered during the EIS process. In addition, the scoping process should be used to help identify other reasonable alternatives. The CEQ regulations at 40 CFR 1501.7 describe the scoping requirements.

5.6.2.1 In cases where an EA has been prepared and the impacts of the proposed project were determined to be significant, the EA shall be the basis on which to move forward in the EIS scoping process.

5.6.2.2 The responsible NIGC official will lead the scoping process. This includes, but is not limited to, inviting or have invited all potentially affected Federal, Tribal, State and local agencies/organizations and/or other interested parties, determining issues to be analyzed in depth, identifying other environmental review and consultation requirements, and assigning responsible lead and cooperating agencies for input to the EIS. In some cases, a scoping meeting may be appropriate and will provide an opportunity to present additional information on the proposed project and solicit input from those interested and affected parties to:

5.6.2.2.1 Determine the scope of analysis required within the EIS;

5.6.2.2.2 Identify and eliminate insignificant issues and those covered in previous environmental reviews;

5.6.2.2.3 Identify alternatives; and

5.6.2.2.4 Identify any other EAs or EISs that are being or will be prepared which are related, but are not part of the scope of the EIS under consideration.

5.6.2.3 Scoping is the point at which substantial efforts should be made to begin the consultation process with local governmental bodies, Federal and State agencies, and other Tribes which may be affected by the proposed project.

5.6.3 *Preparation of the EIS (Format):* The NIGC preferred format follows the format found in 40 CFR 1502.10, with one exception (*See* Table of Contents), and is outlined below. All preliminary, draft, and final EAs shall be submitted to the NIGC in both hardcopy and digital (*e.g.* compact disc) form. A summary is presented in Figure 5–3.

5.6.3.1 *Cover sheet:* The cover sheet shall include: A title (project name, location, and Tribe); the name of each responsible agency (lead and cooperating); lead agency point of contact information; designation of the document as draft or final (prior to the document being released to the public in draft form, it will be designated as a ''Preliminary Draft EIS Version XX'').

5.6.3.2 *NIGC Declaration Page:* This section shall contain the project title, location, designation as Draft or Final Environmental Impact Statement, legal authority citation (National Environmental Policy Act, 42 U.S.C. 4332(2)(C) and Indian Gaming Regulatory Act, 25 U.S.C. 2711); the month and year the draft EIS was made available (only for a final EIS); ''Lead Agency: National Indian Gaming Commission;'' any cooperating agencies; an abstract containing project description and EIS process; and the date on which comments are due (only for a draft EIS).

5.6.3.3 *Table of Contents:* The table of contents should include each chapter, figures, maps, tables, a glossary, references, and appendices. If the table of contents contains sufficient detail, an index may not be required. The responsible NIGC official will determine if an index is necessary.

5.6.3.4 *Executive Summary:* The Executive Summary shall summarize the information in the EIS. It shall focus on the primary conclusions, areas of interest to other agencies and the public, issues resolved (emphasis on the alternatives studied) and unresolved decisions with opinions or recommendations.

5.6.3.5 *Purpose and Need:* The purpose and need for a proposed project has two parts. The ''need'' identifies what the Tribe proposing the project lacks or what it needs. The ''purpose'' identifies that which the Tribe wants to obtain to satisfy its ''need.'' For example, if a Tribe lacks sufficient revenues to pay for essential governmental services, then the Tribe's ''need'' for the project may be to generate funds for essential governmental programs. The Tribe's ''purpose'' may be to enter into a management contract with a casino developer to construct and manage a casino that will generate sufficient revenues to provide essential governmental services for Tribal members.

5.6.3.6 *Alternatives (including the proposed action and the no-action alternative):* Based on information from the ''Affected Environment'' and ''Environmental Consequences'' sections, the alternatives section should ''rigorously explore and objectively evaluate all reasonable alternatives. * * * '' (*See* 40 CFR 1502.14(a)). In conducting this evaluation, it is recommended that screening criteria be developed to identify those alternatives that will not be studied in detail. For example, if a proposed action (with the exception of the no-action alternative) will not meet the ''Purpose and Need,'' it should not be studied in detail and would not be evaluated in the ''Environmental Consequences'' section. When screening potential alternatives, the NIGC along with cooperating agencies, the Tribe proposing the project, and the EIS consultant should work to identify appropriate screening factors. The NIGC's preferred alternative may be noted in the draft EIS, if one exists. Otherwise, the NIGC's preferred alternative shall be identified in the final EIS unless prohibited by another law.

5.6.3.7 *Affected Environment:* This section of the EIS will describe the existing conditions in the area potentially impacted by each alternative. This section should provide enough information to understand the potential effects the alternatives will have on particular resources. The amount of information provided in this section and its sub-sections should be commensurate with the significance of the potential impacts. The area to be described is not limited to the immediate project area and will vary depending on the particular resource category being described. For example, if the project's construction site is the

only area that will experience a change in land use and all surrounding land uses are compatible, there will be no need to analyze changes in the land use description beyond the boundaries of the project site. However, if as part of the proposed project a waste water treatment plant will require discharge to a particular stream and that stream is tributary to another larger body, it may be necessary to expand the water quality description several miles from the project site. The NIGC, cooperating agencies, the Tribe proposing the project and the EIS consultant should work collectively and use input received from interested parties during scoping or information from agencies with jurisdiction or special expertise to identify appropriate ''Affected Environment'' boundaries.

5.6.3.8 *Environmental Consequences:* This section should first describe the methodology used to evaluate the potential impacts to each particular resource category being evaluated. That methodology should be applied to all of the alternatives selected to be studied in detail. The impacts identified for each alternative should then be presented in a manner that allows a comparative analysis of the impacts. This section should then identify those impacts that cannot be avoided; the relationship between short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and any irreversible or irretrievable commitments of resources which would be involved in the proposed project's implementation. Direct, indirect, and cumulative impacts should be evaluated in this section. (Cumulative impacts may be included within each resource category or may be evaluated as a stand alone sub-section. In addition to the analysis and potential impacts, this section must also include information regarding the status of interagency, intergovernmental consultation required by any special purpose environmental law(s), regulation(s), or executive order(s).

5.6.3.9 *Mitigation:* This section shall describe mitigation measures that were considered and planned to minimize environmental harm that may result from the proposed project. It is expected that the following types of mitigation will be included: design and construction actions to avoid or reduce impacts; design measures that reduce impacts; management actions that reduce impacts during operation of the facility; and replacement, restoration, reuse, conservation, preservation, and compensation measures. In accordance with 25 CFR 531.1(b)(16), the management contract (if approved) will assign either the Tribe or casino manager the responsibility to ''supply the National Indian Gaming Commission…with all information necessary for the Commission to comply with…the National Environmental Policy Act (NEPA).'' This shall include, but is not limited to, documentation that all mitigation and other conditions established in the EIS and committed to in the ROD, or in agreements with State/local agencies or organizations, and included as a condition of the project approval, will be implemented.

5.6.3.10 *List of Preparers:* This section shall include a list of each person's name and their qualifications (*e.g.* expertise, experience, professional disciplines) of the NIGC staff, cooperating agency(ies) staff, EIS consultant staff and sub-contractors staff who assisted in preparing the EIS or associated environmental studies.

5.6.3.11 *List of Agencies, Organizations, Person(s) to whom and Locations where Copies of the EIS were Sent:* This list is provided for reference purposes and to demonstrate that the EIS has been circulated and the public review process followed.

5.6.3.12 *Appendices:* This section consists of material that substantiates any analysis that is fundamental to the EIS and its conclusions, but would substantially contribute to the length of the EIS or detract from the document's readability, if included in the body of the EIS. This section should contain information and documentation about formal and informal consultation conducted and related agreement documents prepared pursuant to other applicable environmental laws, regulations, and executive orders.

All comments received on any version of the draft EIS and the preliminary final EIS are assessed and responded to in the final EIS. Any comments received on the final EIS are assessed and responded to in the Record of Decision (ROD). Comments shall be responded to in any or all of the following ways:

- Written into the text of the final EIS;
- Included or summarized and responded to in an appendix to the final EIS or ROD, and if voluminous, may be compiled in a separate supplemental volume for reference.

FIGURE 5–3—ENVIRONMENTAL IMPACT STATEMENT CONTENT

Purpose	• Provide an in-depth review of environmental impacts for all major NIGC actions before a decision is made. • Examines the environmental impacts of a range of reasonable alternatives to the proposed action. • Discloses to the public and the decision maker the alternatives, impacts, and mitigation.
Scope	• Provide a comprehensive review of all impacts of the proposed action and alternatives, including a no-action alternative.
Content	• Include the following: • Cover sheet, • Table of Contents, • Executive Summary, • Purpose and Need, • Alternatives considered, including the proposed action and the no-action alternative, • Affected Environment, • Environmental Consequences, • Mitigation, • Coordination and Consultation, • List of Preparers, • Appendices, and • Summary of Public comments. • Changes to this format must be approved by the NIGC.

FIGURE 5–3—ENVIRONMENTAL IMPACT STATEMENT CONTENT—Continued

Public Participation	• Provide for 60-day comment period on the draft EIS. • Hold at least one (1) public hearing. • Provide a 30-day waiting period following the publication of the final EIS before issuing the ROD.

5.7 Timing of Actions

5.7.1 While the minimum comment period for the draft EIS is 45 days (40 CFR 1506.10(c)), the NIGC has chosen to provide a 60-day draft EIS comment period. The NIGC has the discretion to voluntarily extend any comment period beyond those included in this manual, the CEQ regulations, or other environmental laws. The same discretion shall be applied to the NIGC's decision to approve or deny any request for an extension to any comment period. A public hearing shall be held no sooner than 15 days following publication of the notice of availability (NOA). The NIGC's final record of decision (ROD) on the proposed action cannot be made until 90 days after the filing of the draft EIS (40 CFR 1506.10(b)(1)) and 30 days after filing of the final EIS. If another Federal agency provides a showing of compelling reasons regarding national policy to the EPA, the EPA may extend the comment period after consultation with the NIGC. If the NIGC does not concur with the extension proposed by EPA, the EPA cannot extend the time period for more than 30 days. The EPA may also reduce the comment period if the NIGC shows a compelling reason of national security (*See* 40 CFR 1506.10(d)). The NIGC may issue its own detailed NOA in addition to the NOA published by the EPA. However, a NOA issued by the NIGC cannot substitute for the NOA issued by the EPA. If the NIGC decides to extend the comment period, the EPA must be notified so it may modify its **Federal Register** notice accordingly.

5.7.2 In order to have the EPA publish a NOA, the NIGC shall send five (5) copies of the draft EIS to the U.S. Environmental Protection Agency, Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Mail Code 2252–A, Room 7241, 1200 Pennsylvania Ave., NW., Washington DC 20460. (**Special Note:** For all deliveries by courier, including express delivery services other than the U.S. Postal Service, use 20004 as the zip code.) The responsible NIGC official should access the NEPA Web site of the EPA's Office of Federal Activities to verify that the filing instructions provided herein are current (*http://www.epa.gov/compliance/nepa/*).

5.8 Draft EIS

5.8.1 *Internal Review:* Prior to releasing the draft EIS to the public and other agencies, the draft EIS will be prepared and reviewed by the NIGC, and all cooperating agencies. This version of the draft EIS will be designated as the ''preliminary draft EIS.'' This review is intended to ensure that the document is technically and legally sufficient. It is intended to ensure that the concerns of NIGC and cooperating agencies are properly discussed in the document prior to its public release.

5.8.2 *Filing the DEIS:* Once the internal review is complete, the document should then be designated as the ''draft EIS'' and five (5) copies of it must be sent to the EPA at the address in Section 5.7.2.

5.8.3 *Public Notice:* The responsible NIGC official, in accordance with 40 CFR 1502.19, shall ensure the draft EIS has been delivered to interested parties, appropriate libraries, and other public venues that provide the public an opportunity to review and comment on the draft EIS.

5.8.3.1 Once delivery to appropriate public venues has been confirmed, the responsible NIGC official shall attach a letter with five (5) copies to be sent to the EPA certifying that the draft EIS has been delivered. The EPA will normally publish the draft EIS NOA in the **Federal Register** two (2) weeks after receiving the NIGC's certification of distribution. Once delivered, it is recommended that the responsible NIGC official contact the EPA for the exact date that it will be published.

5.8.3.2 The responsible NIGC official shall ensure that an NIGC NOA be published in the **Federal Register,** other notices are published in local media (*e.g.* local newspapers), and that the NIGC issue a press release. Every effort should be made to have the above mentioned notices published on the same date the EPA's notice will be published.

5.8.3.3 The following standard language shall be used in the certification to EPA, notices to local media, and the NIGC press release:

> The NIGC encourages all interested parties to provide comments concerning the scope and content of the draft EIS. Comments should be as specific as possible and address the analysis of potential environmental impacts and the adequacy of the proposed action or merits of alternatives and the mitigation being considered. Reviewers should organize their participation so that it is meaningful and makes the agency aware of the reviewer's interests and concerns using quotations and other specific references to the text of the draft EIS and related documents. This commenting procedure is intended to ensure that substantive comments and concerns are made available to the NIGC in a timely manner so that the NIGC has an opportunity to address them.

5.8.4 Distribution and Coordination for Intergovernmental Review

5.8.4.1 Comments from appropriate Federal, Tribal, State, and local agencies and organizations that did not act as cooperating agencies, but have jurisdiction by law, have special expertise, will be impacted by the proposed action, or are otherwise an interested party, shall be requested and accepted.

5.8.4.2 Copies of the draft EIS shall be sent to:

5.8.4.2.1 Appropriate Federal, Tribal, State and local agencies and organizations as described in 40 CFR 1503.1, and

5.8.4.2.2 Regional EPA office with jurisdiction over the proposed project site (1 copy).

5.8.4.2.3 If the proposed project occurs within a State that has an established clearinghouse, delivery of the draft EIS should follow the clearinghouse's procedures.

5.8.5 *Copies:* The responsible NIGC official shall have a sufficient number of draft EISs prepared to meet the anticipated demand of Section 5.8.4. Copies will be prepared for those agencies/organizations noted in Section 5.8.4.2 free of charge. A fee, not to exceed reproduction costs, may be charged for copies requested by the public if the original set of copies has been exhausted. Material used in developing or referenced in the draft EIS must be available for review at an NIGC designated location. In an effort to decrease printing cost and increase distribution, the draft EIS should be prepared and circulated in Adobe Acrobat format (pdf) on a CD–ROM and placed on the Internet to the greatest degree possible.

5.8.6 *Comments:* The responsible NIGC official shall take into consideration all comments received

from Federal, Tribal, State, local agencies and organizations, and the public. As a part of the consideration process, the NIGC official must respond to all substantive comments in the final EIS. Any comments on the draft EIS, including those made during the public hearing, shall accompany the final EIS through its internal review process. The draft EIS will be revised, as appropriate, to reflect comments received, and issues raised through the entire public involvement process. Copies of substantive comments shall be included in the final EIS or as a separate accompanying appendix. If the number of comments is too voluminous to include, the comments may be summarized. (*See* also Section 5.6.3.12 of this manual.)

5.9 Review and Approval of Final EIS

5.9.1 As part of the EIS process, environmental issues are defined and mitigation measures identified. All efforts should be made to complete environmental consultation and coordination requirements before publication of the final EIS to ensure consideration of meaningful public comment provided on the draft and to streamline the environmental review and permitting/approval processes. The final EIS shall reflect that there is compliance with the consultation and coordination requirements of all applicable environmental laws, regulations, and executive orders. If it is not possible to complete environmental consultation and coordination requirements prior to publication of the final EIS, the final EIS will reflect the state of ongoing consultation(s) and coordination(s) with appropriate agencies and note that the requirements will be met. Any unresolved environmental issues and efforts to resolve them through further consultation will be identified and discussed in the final EIS. The required consultation and coordination must be completed prior to the NIGC issuing a ROD.

5.9.2 *Internal Review:* This review shall follow the same format as that set out in Section 5.8.1. The internal review document shall be titled ''Preliminary Final EIS.''

5.9.3 Final EIS Approval

5.9.3.1 The following declaration shall be added to the NIGC Declaration page:

After careful and thorough consideration of the facts contained herein and following consideration of the views of those Federal, Tribal, State, and local agencies authorized to develop and enforce environmental standards or having jurisdiction by law or special expertise with respect to the environmental impacts described, the undersigned finds that the proposed Federal action is consistent with existing national environmental policies and objectives as set forth in § 101(a) of the National Environmental Policy Act of 1969.

5.9.3.2 The Declaration page shall include signature and date blocks for the decisionmaker (the NIGC Chairman).

5.10 Notice of Availability of Final EIS

5.10.1 The Notice of Availability for the approved final EIS should follow the same process as that for the draft EIS (*See* § 5.7.2 and 5.8.2).

5.11 Distribution of Approved Final EIS

5.11.1 Distribution of the approved final EIS shall follow the same process as that for the draft EIS (*See* §§ 5.8.4 and 5.8.5).

5.12 Record of Decision

5.12.1 The ROD is the NIGC's decision document. The NIGC may not make a decision until 90 days after the draft EIS NOA and 30 days after the final EIS NOA are published.

5.12.2 The NIGC Chairman shall be responsible for signing all RODs.

5.12.3 Any mitigation measures contained in the final EIS must be included in the ROD. A monitoring and enforcement plan may be adopted to ensure compliance with all mitigation measures. Proposed changes to mitigation measures must be reviewed by the same Federal, Tribal, State, or local agencies/organizations that reviewed the final EIS and must be approved by the NIGC Chairman.

5.12.4 In addition to the alternatives considered in the draft and final EIS, the ROD must identify the ''environmentally preferable'' alternative (*See* 40 CFR 1505.2(b)).

5.12.5 The NIGC Chairman may choose an alternative that was included in the final EIS but was not the environmentally preferred alternative(s) nor the NIGC's preferred alternative identified in the final EIS. If the final EIS's preferred alternative is not selected, the Federal, Tribal, State and local agencies/organizations may need to be consulted to ensure that the selected alternative complies with special environmental laws, regulations, and executive orders. In some cases, a supplemental final EIS may be necessary and should be reviewed and approved in accordance with Section 5.16.

5.12.6 An NOA for a ROD is not required unless the action is of national concern, but the ROD must be made available to the public. It is recommended that a notice be published via local media (*e.g.* local newspapers) and the ROD be made available at local libraries or other public depository. The notice and ROD also may be published and made available via other means (*e.g.,* on the NIGC Web site or the project's individual Web site).

5.13 Programmatic EISs

5.13.1 *Programmatic EISs:* Given that most NIGC actions that require an EIS are specific to individual Tribes, it is not anticipated that a Programmatic EIS would be appropriate. Therefore, this section is reserved.

5.14 Time Limits for EISs

5.14.1 A draft EIS is normally valid for a period of three (3) years except when there are substantial changes in the proposed action, there are significant new circumstances, or there is new information relevant to environmental concerns regarding the proposed action or its impacts. In cases of significant new circumstances or information, a written re-evaluation must be undertaken. (*See* Section 5.15.) In cases of significant new circumstances or information that affect the NIGC's consideration of the proposal, a supplement to the draft EIS or a new draft EIS will be prepared and circulated (*See* Section 5.16).

5.14.2 A final EIS shall be assumed to be valid for a period of three (3) years. For a final EIS more than three (3) years old, the following conditions apply:

5.14.2.1 If major steps toward implementation of the proposed project/action (*e.g.* start of construction or land being taken into trust by the Department of the Interior) have not commenced within three (3) years from the date of the final EIS approval, a written re-evaluation (*See* Section 5.15) of the adequacy, accuracy, and validity of the final EIS will be prepared by or for the responsible NIGC official. If the responsible NIGC official determines that there have been significant changes that affect the NIGC's consideration of the proposal, a supplement to the final EIS or a new final EIS will be prepared and circulated.

5.14.2.2 If the proposed action is to be implemented in stages or requires successive Federal approvals, a written re-evaluation (*See* Section 5.15) of the continued adequacy, accuracy, and validity of the final EIS will be made at each major approval point that occurs more than three (3) years after approval of the final EIS and a new or supplemental EIS prepared, if necessary.

5.15 Written Re-Evaluation

5.15.1 The preparation of a new or supplemental EIS is not necessary when it can be documented that the:

5.15.1.1 Proposed action is reasonably consistent with plans or projects for which a prior EIS has been filed and there are no substantial changes in the proposed action that are relevant to environmental concerns;

5.15.1.2 Data and analyses contained in the previous EIS are still substantially valid and there are no significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; and

5.15.1.3 All pertinent conditions and requirements of the prior approvals have, or will be, met in the current action.

5.15.2 The analysis and conclusions in a written re-evaluation must be made and certified by an environmental professional. The written re-evaluation must contain enough information for the responsible NIGC official to independently evaluate the changes and conclude the contents of the previously prepared environmental documents remain valid or that significant changes require the preparation of a new EIS.

5.15.3 A written re-evaluation may be circulated to the public at the discretion of the responsible NIGC official.

5.16 Supplemental EISs

5.16.1 The NIGC shall prepare or have prepared supplements to either the draft or final EISs (1) if there are substantial new circumstances or there is new information (*See* 40 CFR 1502.9(c)(1)(i & ii) regarding the proposed action that is relevant to environmental concerns, or (2) if there are significant new circumstances or there is information relevant to environmental concerns and bearing on the proposed action or its impacts. Significant information is information showing dramatic changes to the impacts of the proposed project compared to those identified in the original draft or final EIS.

5.16.2 Supplemental documents will be prepared and circulated in accordance with the procedures of this chapter.

5.16.2 If a ROD was issued prior to a supplemental EIS, a new ROD shall be prepared and issued after the supplement has been circulated for 30 days.

5.17 Referrals to Council on Environmental Quality (CEQ)

5.17.1 A project may be referred to CEQ when a cooperating or commenting agency disagrees regarding the proposed project's potential to cause unsatisfactory environmental effects. Referrals to CEQ shall be made in accordance with 40 CFR part 1504.

5.17.2 If the NIGC disagrees regarding another agency's proposed project's potential to cause unsatisfactory environmental effects, the NIGC may refer that project to CEQ. Referrals to CEQ are made in accordance with 40 CFR part 1504.

5.18 Review/Comment and Adoption of EISs

5.18.1 *Comments:* Federal, Tribal, State and local agencies/organizations may review and comment on the draft and final EIS. When comments are submitted to the NIGC, they should be specific in nature and organized in a manner consistent with the structure of the draft or final EIS and may identify modifications that might enhance environmental quality or avoid or minimize adverse environmental impacts, and will correct inaccuracies or omissions. Comments will be submitted within the time limits set forth in the request, unless the agency/organization responsible for submitting comments seeks and receives an extension from the responsible NIGC official.

When the NIGC is participating in the preparation of an EIS as a cooperating or commenting agency, the responsible NIGC official shall provide comments that are specific in nature and organized in a manner consistent with the structure of the draft or final EIS and may identify modifications that might enhance environmental quality or avoid or minimize adverse environmental impacts, and will correct inaccuracies or omissions. Comments will be submitted within the time limits set forth in the request, unless the NIGC seeks and receives an extension from the lead Federal agency.

5.18.2 *Adoption:* The NIGC may adopt, in whole or in part, a draft or final EIS prepared by another agency in accordance with 40 CFR 1506.3. When the NIGC adopts another agency's EIS, the responsible NIGC official must independently evaluate the information contained in the EIS, take full responsibility for the scope and content that addresses the NIGC action, issue its own ROD, and provide notification to EPA that the NIGC has adopted the EIS. The same time limits described in Section 5.14 also apply to EIS prepared by other agencies and adopted by the NIGC.

5.19 Reserved

George Skibine,

Acting Chairman.

Appendix A—Resource Categories

The purpose of this Appendix is to provide a list of resource categories to be evaluated in an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The following list is not exhaustive. Resource categories may be added when the proposed action has the potential to impact a resource not listed below.

Resource Categories

Geology and Soils
Land Use
Farmlands
Air Quality
Water Quality (Surface and Ground)
Floodplains
Wild and Scenic Rivers
Coastal Resources
Wetlands
Biotic Communities
Endangered Species
Historic, Architectural, Archeological, and Cultural Resources
Traffic
Noise
Light and Aesthetics
Socioeconomic, Environmental Justice, and Children's Environmental Health and Safety
Hazardous Materials, Pollution Prevention and Solid Waste
Public Services (municipal water supply, waste water services, electric, *etc*)
Public Safety (Police, Fire, Emergency Medical, *etc*)

Appendix B—Example MOU for EIS Cooperating Agencies

The following is an example of a Memorandum of Understanding (MOU) used when cooperating agencies will be participating in the preparation of an EIS. It is strongly recommended that any potential cooperating agency sign an MOU before being accepted as an official cooperating agency in the preparation of an EIS. The example MOU is only an example and may be modified to fit the individual circumstances of each EIS being prepared. Each cooperating agency representative must sign the MOU. The MOU must then become part of the administrative record.

Draft Memorandum of Understanding Between the Lead and Cooperating Agencies for the (Tribe Name) Proposed (Project Title) Environmental Assessment or Environmental Impact Statement.

This Memorandum of Understanding (MOU) between the National Indian Gaming Commission (NIGC), the lead Federal agency, and, inclusively, the *Cooperating Agency,* and the *Tribe name (if designated as a cooperating agency*) the cooperating agencies, is for the consultation, preparation assistance, and review of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) that will describe and analyze the potential environmental effects of the proposed NIGC approval of a

management contract for the *Project Title* (the Project) located in *Location*. The *Tribe name* is the tribe that has the proposed project. The cooperating agencies' involvement is intended to assist the NIGC with all issues involving the environmental review under their jurisdiction associated with the project. This MOU describes the agencies' (signatories) respective responsibilities regarding completion of an EIS pursuant to the requirements of the National Environmental Policy Act (NEPA) *and, if applicable, other environmental reviews pursuant to the requirements of the state NEPA-like statute.*

I. Purpose

The purpose of this MOU is:

(1) To confirm the formal designation of the *Cooperating Agency* and the *Tribe name* as cooperating agencies in the preparation of the EIS;

(2) To define each signatory's role, obligations, and jurisdictional authority regarding the EIS;

(3) To provide input in the preparation of an EIS that will enable the NIGC to adequately consider impacts to the natural and human environment and the *Cooperating Agency* and the *Tribe name* to properly address potential project related environmental impacts in connection with their regulatory objectives; and

(4) To provide a framework for cooperation and coordination among the signatories to facilitate completion of the NEPA process including issuance of required findings and to fulfill other environmental responsibilities each signatory may have.

II. Regulatory Criteria

Under NEPA [42 U.S.C. 4371 *et seq.*], the NIGC, as lead Federal agency, has the responsibility to designate those portions of EA or EIS upon which each cooperating agency will focus its evaluation of environmental issues. The designations will be based upon legal jurisdiction or special expertise of the cooperating agency, and will not limit that agency's ability to comment on other environmental resources or aspects of the EIS.

The signatories to this MOU shall cooperate fully and share information and technical expertise to evaluate the potential environmental effects of the proposed action and its alternatives. Each signatory shall give full recognition and respect to the authority, expertise, and responsibility of the others. Participation in this MOU does not imply endorsement of the proposed project, nor does it abridge the independent review of the Draft and Final EIS by the signatory agency. The agencies will make every effort to raise and resolve issues during scoping and EIS preparation. The signatories acknowledge that the NIGC, as lead agency, has the responsibility for the content of the Draft and Final EIS and its conclusions.

III. Procedures

1. The NIGC is the lead Federal agency for this project. It is ultimately responsible for preparing the Draft and Final EIS and for assuring compliance with the requirements of NEPA and other applicable laws and regulations. The NIGC agrees to give full respect and recognition to the jurisdiction of the *Cooperating Agency* and the *Tribe name.* The NIGC is responsible for considering impacts to the quality of the natural and human environments associated with the proposed project. In meeting its core NEPA responsibilities, the NIGC will use the environmental analyses, proposals, and special expertise of the cooperating agencies to the maximum extent possible consistent with its responsibilities, and as the lead agency, will retain ultimate responsibility for the EIS's content (*See* 40 CFR 1501.6(a)(2) and CEQ's 40 Questions, No. 14.b.). This includes defining the issues, determining purpose and need of the project, selecting or approving alternatives and mitigation measures, reviewing any required modification of the EIS, responding to comments on the Draft EIS, and retaining responsibility for the conclusions of its environmental analysis. In addition to responding to comments and conducting the appropriate level of public involvement in advance of the combined undertaking, the NIGC may employ other opportunities to involve and obtain input from all interested parties. Other opportunities include but are not limited to informal/formal consultation and environmental conflict resolution.

2. The goal of the signatories is to assist in the preparation of an EIS that contains all the information each signatory needs to fulfill its responsibilities under NEPA *or, if applicable, tribal or state NEPA-like statute,* and make independent decisions within its jurisdiction. As such, *Cooperating Agency* and the *Tribe name* are to participate in the NEPA process at the earliest appropriate time, make staff support available, exchange relevant information throughout the EIS process, submit independent recommendations, and assist the NIGC in developing responses to subtantive comments received on the Draft and Final EIS, as resources allow. *Cooperating Agency* and the *Tribe name* will be responsible for the preparation of any portion of the EA/EIS or related technical reports described below in the roles and responsibilities section. In addition, they will also have the opportunity to provide comments to the NIGC on the other portions of the EA/EIS.

3. The procedures for EIS project development and interagency coordination contained in NEPA; the Clean Water Act—Sections 401, 402, and 404; the Clean Air Act; Endangered Species Act (ESA); and National Historic Preservation Act (NHPA); and other applicable environmental laws are incorporated herein by reference.

4. As appropriate, and to enhance the effectiveness of this MOU, the NIGC will work with *Cooperating Agency* and the *Tribe name* to ensure access to the NIGC expertise, data, information, analyses, and comments received. It is understood that any necessary communication with the NIGC's EIS consultant will be in coordination with the responsible NIGC official.

5. The *Cooperating Agency* and the *Tribe name* will each identify a designated Point of Contact (POC) for coordination and consistency on this project. Due to the complexity of the project, the agencies realize that this is a long-term commitment of resources and will make every effort to maintain the same POC through the duration of the NEPA process. If reassignment of the POC becomes necessary, the agency will notify the MOU signatories of said change. In such cases, previous agreements, concurrences, and positions will not be revisited unless there is significant new information or significant changes to the project, environment, or laws and regulations.

6. The signatories will ensure that appropriate coordination, communication, project updates and status reviews occur, as needed, to keep each other current on the project's progress.

7. The NIGC will appropriately incorporate the comments, analysis, recommendations, and/or data submitted by the *Cooperating Agency* and the *Tribe name* in the Draft and Final EIS, and will utilize a systematic, interdisciplinary approach that will ensure the integrated use of the submitted material [40 CFR 1501.6(a)(2) and 1502.6].

8. The NIGC will promptly inform *Cooperating Agency* and the *Tribe name* of all schedule changes that would affect *Cooperating Agency* and the *Tribe name's* ability to provide timely input for a document review. Adequate time will be given for agency reviews especially when there is significant new information or significant changes to the project, environment, or laws or regulations.

9. To the maximum extent permitted by applicable federal, tribal, or state law, *Cooperating Agency* and the *Tribe name* will keep confidential and protect from public disclosure any and all documents received prior to determination of suitability for public review or release under the directives of the Freedom of Information Act (FOIA). The *Cooperating Agency* and the *Tribe name* will coordinate all FOIA requests received on the project with the NIGC prior to releasing documents. The NIGC will promptly respond to such coordination requests in order to enable the *Cooperating Agency* and the *Tribe name* to meet its FOIA obligations.

10. *Cooperating Agency* the *Tribe name* agree not to employ the services of any representative or party having a financial interest in the outcome of the proposed project in a capacity directly related to *Cooperating Agency* and the *Tribe name* obligations as a cooperating agency. *Cooperating Agency* and the *Tribe name* will take all necessary steps to ensure that no conflict of interest exists with its consultants, counsel, or representatives employed in this undertaking. [40 CFR 1506.5 (c)] If disclosure statements are obtained as a result of contractor or other selection regarding this action, copies of the disclosure statements will be forwarded to the NIGC.

IV. Roles and Responsibilities

The NIGC and each of the cooperating agency(s) agree to the following roles and responsibilities:

- Follow the procedures as outlined in Section III of this MOU.
- Comply with timelines and deadlines as established by the NIGC or contact the NIGC as soon as possible if timelines or deadlines cannot be met.

• Act in good faith when conducting cooperating agency duties identified within this MOU and the NIGC NEPA Procedures Manual.

• *Other roles and responsibilities as identified prior to signing this MOU.*

All parties will work together to provide oversight, guidance, and comment to assure the EIS's consistency for compliance with all appropriate federal, tribal, state and local laws, statutes, orders, regulations, and guidance within their jurisdiction by law or special expertise.

V. Administration

1. Nothing in this MOU will be construed as affecting the authority of any signatory beyond those agreements contained within this MOU.

2. This MOU does not obligate the NIGC to provide funding for the [*Cooperating Agency Name*] and the [*Tribe Name*] involvement in this effort, nor does it require [*Cooperating Agency Name*] and the [*Tribe Name*] to obligate or expend funds in excess of available appropriations.

3. If a disagreement should develop between the agencies, the POC's will expeditiously attempt to resolve the disagreement through consensus. If timely amicable resolution is not achieved at the POC level, the matter shall be promptly referred to mid-level management of these agencies for their participation in the resolution process. In the event that mid-level managers are unable to reach a satisfactory solution, the persons whose signature appears in Section VI of this MOU will work to resolve the dispute.

4. This MOU shall be terminated when the NIGC issues a Record of Decision or for reasons of good cause upon 30 days prior written notice. An example of good cause would be the *Tribe name* withdrawal of the proposed action.

5. Any signatory may request re-negotiation or modification of this MOU at any time. All signatories will consider the proposed changes, and upon mutual agreement, adopt the proposed changes. The signatory that proposed the change shall provide copies of the adopted revised MOU to the other signatories.

6. This MOU shall be incorporated into or referenced in the Draft and Final EIS for public review so that each signatory's respective roles may be fully understood.

VI. Agreement To Participate in This MOU

_____

Name, Chairman
National Indian Gaming Commission

_____

Date

_____

Name
Cooperating Agency

_____

Date

_____

Name
Tribal Chairperson/President/etc.
Tribal Name

_____

Date

_____

Name/Title
Other Cooperating Agencies

_____

Date

Appendix C—Third Party Contracting Guidance

C–1: Introduction and Purpose

According to CEQ regulation (40 CFR 1506.5(c)), an Environmental Impact Statement (EIS) must be prepared by the lead agency or an environmental consultant/contractor (contractor). The contractor must be selected by the lead agency (NIGC). The purpose for the lead agency selecting the contractor is to avoid conflicts of interest. However, in most cases, the proponent of a project usually pays for the contractor's services. This is commonly known as ''Third Party Contracting.'' The purpose of this appendix is to provide guidance on important issues raised when selecting and using a contractor.

C–2: Scope of Work

Before a contractor can be selected, a Scope of Work (SOW) must be developed. It is important to involve the project proponent in the development of a SOW. Both the NIGC, as the lead agency, and the Tribe, as the project proponent, should come to terms on what will be included in the SOW. The SOW should only contain those tasks the NIGC and Tribe have identified as being required to comply with NEPA, NIGC procedures contained in this manual, and other laws, and keeping of the administrative record during the preparation of the EIS. The SOW should not contain any tasks that would be undertaken after the EIS is complete and the ROD is issued.

As a general rule, a SOW should contain the following: An introduction of the project, the conceptual design of the proposed project, a task-by-task listing of the analysis required to complete the EIS, the requirements needed to comply with NEPA, the NIGC procedures contained in this manual, and other laws, and the keeping of the administrative record. The task(s) that identify the analysis should include any specific methodologies that are known to be needed. The task(s) should also include the identification of and support for meetings, teleconferences, and hearings. The important thing to remember when developing a SOW is to include everything needed to comply with NEPA. The SOW should provide the flexibility to add to or delete tasks identified through the scoping process and subsequent development of analysis.

The SOW should also identify how prospective contractors package their proposals. Establishing a single format for proposals will make it easier to evaluate each contractor's proposal against the others. If a contractor plans to use sub-contractors for some tasks, it should be noted in their proposal. It may be necessary for the NIGC to consult with the Tribe to identify prospective contractors. The SOW will then serve as the backbone of the ''Request for Proposal'' (RFP).

C–3: NIGC Evaluation and Selection

Once all prospective contractors have submitted their proposal to prepare the EIS, the NIGC official will review and evaluate each proposal. The evaluation can take one or more of the following forms: Interviews with the proposed Project Manager, calling references, and/or reviewing other EISs they have prepared. The NIGC official should develop a ranking system to aid in identifying the best contractor candidate. Once the NIGC official has evaluated each proposal and ranked it, the contractor should be notified. In addition, the Tribe should also be notified. At this point it is important for the NIGC official to consult with the Tribe to ensure a financial mechanism is in place so as not to delay the start of the EIS preparation by the contractor.

In notifying the Tribe and the contractor, the NIGC official should develop a Memorandum of Understanding (MOU). This MOU should delineate the roles and responsibilities of the NIGC, the Tribe, and the contractor during the preparation of the NEPA analysis and documentation. All three parties (the NIGC, the Tribe, and the Contractor) should then have the appropriate person with that organization sign the MOU.

C–4: Financial and Other Interest Disclosure

In accordance with 40 CFR 1506.5(c), the contractor is required to sign a disclosure form that states their company has no financial or other interest in the outcome of the EIS. (*See* Form on next page.) If the contractor plans to use sub-contractors, they are also required to sign a disclosure form. These forms must be kept in the administrative record.

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Appendix D: Financial Disclosure Form

Disclosure Statement

for the *Project Title*

Environmental Impact Statement

CEQ Regulations at 40 C.F.R. §1506.5(c), require contractors who will prepare an Environmental Impact Statement (EIS) to execute a disclosure statement, specifying that they have no financial or other interest in the outcome of the EIS. The term "financial or other interest in the outcome of the project" means any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g. if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit.

In accordance with these requirements, _____
(company/individual name)
hereby certifies that they have no financial or other interest in the outcome of the project.

Certified by:

_____ _____
Signature Date

_____ _____
Printed Name Title

_____
Company Name

[FR Doc. E9–28944 Filed 12–3–09; 8:45 am]
BILLING CODE 7565–02–C

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1046 (Review)]

Tetrahydrofurfuryl Alcohol From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines,[2] pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on tetrahydrofurfuryl alcohol from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on July 1, 2009 (74 FR 31752) and determined on October 5, 2009 that it would conduct an expedited review (74 FR 54067, October 21, 2009).

The Commission transmitted its determination in this review to the Secretary of Commerce on November 30, 2009. The views of the Commission are contained in USITC Publication 4118 (November 2009), entitled *Tetrahydrofurfuryl Alcohol from China: Investigation No. 731–TA–1046 (Review).*

By order of the Commission.

Issued: November 30, 2009.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E9–28906 Filed 12–3–09; 8:45 am]

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DEPARTMENT OF JUSTICE

Notice of Lodging of a Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on November 23, 2009, a proposed Consent Decree in the case of *United States* v. *Logistics Intnt'l—Georgia, Inc.,* No. 5:08CV00095, was lodged with the United States District Court for the Western District of Virginia.

In this proceeding, the United States filed a claim pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9607, for reimbursement of costs incurred in connection with response actions taken at the I–81 Tractor Trailer Chemical Spill Superfund Site in Fort Defiance, Virginia. Pursuant to the Consent Decree, the Defendant agrees to pay $450,000 in reimbursement of costs previously incurred by the United States.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov,* or mailed to: P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to: *U.S.* v. *Logistics Intnt'l, Inc.,* DJ. Ref. 90–11–3–09302.

The Consent Decree may be examined at U.S. EPA Region III, Office of Regional Counsel, 1650 Arch Street, Philadelphia, PA 19103–2029, c/o Mark Bolender, Esq. During the public comment period, the Consent Decree may also be examined at the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Settlement Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $ 4.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–28946 Filed 12–3–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

[F.C.S.C. Meeting Notice No. 9–09]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of Commission business and other matters specified, as follows:

DATE AND TIME: Friday, December 18, 2009, at 11:30 a.m.

SUBJECT MATTER: Issuance of Proposed Decisions in claims against Albania and Libya.

STATUS: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Room 6002, Washington, DC 20579. Telephone: (202) 616–6975.

Mauricio J. Tamargo,

Chairman.

[FR Doc. E9–29066 Filed 12–2–09; 4:15 pm]

BILLING CODE 4401–BA–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement: Quarterly Publication of a ''Corrections Mental Health Newsletter''

AGENCY: National Institute of Corrections, Department of Justice.

ACTION: Solicitation for a cooperative agreement.

SUMMARY: The National Institute of Corrections (NIC) is soliciting proposals from organizations, groups or individuals to enter into a cooperative agreement for a twelve-month period to publish a ''Corrections Mental Health Newsletter'' on a quarterly basis providing up-to-date information, news, research, relevant issues, highlighted training and programs, etc. to a correctional audience responsible for, and interested in mental health issues in community corrections, prisons and jails. It is expected that such a newsletter will be published quarterly with the first publication anticipated to be released in February/March 2010 and continue quarterly thereafter for the calendar year. The recipient of this award may be awarded a cooperative agreement for up to two successive years in 2011 and 2012 to continue the publication.

DATES: Applications must be received by 2 p.m. EDT on Friday, January 15, 2010.

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Vice Chairman Daniel R. Pearson and Commissioners Deanna Tanner Okun and Charlotte R. Lane dissenting.

ADDRESSES: Mailed applications must be sent to: Director, National Institute of Corrections, 320 First Street, NW., Room 5007, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date.

Hand delivered applications should be brought to 500 First Street, NW., Washington, DC 20534. At the front desk, dial 7–3106, extension 0 for pickup.

Faxed applications will not be accepted. Electronic applications can be submitted via *http://www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this announcement can be downloaded from the NIC Web page at *http://www.nicic.gov.*

All technical or programmatic questions concerning this announcement should be directed to Michael Dooley, Correctional Program Specialist (CPS), National Institute of Corrections (NIC) at *mdooley@bop.gov.*

SUPPLEMENTARY INFORMATION:

Overview: The overall goal of the initiative is to provide corrections mental health professionals, practitioners, policy makers and others with an interest in mental health and corrections an up-to-date outlet for communicating relevant, comprehensive and timely information on issues and resources pertaining to mental illness and mental health issues in jails, prisons and community corrections.

Background: Substantial numbers of persons with mental illness have found their way into all areas of the criminal justice system including corrections. According to the New Freedom Commission on Mental Health: Subcommittee on Criminal Justice, ''people with serious mental illnesses who come in contact with the criminal justice system are typically poor and uninsured, are disproportionately members of minority groups, and often are homeless and have co-occurring substance abuse and mental disorders. They cycle in and out of homeless shelters, hospitals, and jails, occasionally receiving mental health, substance abuse services, but most likely receiving no services at all (APA, 2000).'' The large and disproportionate number of offenders under correctional custody and supervision continues to be a serious management and safety problem in both our correctional institutions and our communities. This is not a new problem and has been a trend over the past four decades.

A new study conducted by the Council of State Governments Justice Center, in partnership with Policy Research Associates on the prevalence of adults with serious mental illnesses in jails released in the summer of 2009 found that more than 20,000 adults entering five local jails document serious mental illnesses in 14.5 percent of the men and 31 percent of the women, rates in excess of three to six times those found in the general population. Prevalence estimates for females were double those for male inmates. This gender difference is particularly important given the rising number of women in U.S. jails. These findings represent the most reliable estimates in the last 20 years of rates of serious mental illness among adults entering jails. (Steadman, Osher, Robbins, Case and Samuels, June 2009)

In a NIC 2008 Needs Assessment, interviewees noted that problems with mental illness continue to challenge both prison and jail operations, and there is a critical need for more collaboration with providers of services for the mentally ill and a review of policies driving them into the corrections system. According to the 2005 NIC Needs Assessment ''Adequacy of offender mental health care'' was the second highest (2.48) concern to senior corrections officials (Clem and Eggers, 2005).

The challenges to corrections are significant and multi-faceted. This frequent involvement with the criminal justice system will continue to have a significant adverse impact on corrections, public safety and government spending, not to mention the devastating impact for these individuals and their families. The mentally ill offender, along with the professionals and practitioners who make policy and make operational decisions, need a conduit and voice for the current news, trends and issues. It is about being routinely informed so that best policy, best practice and best responses emerge as the foundation for managing mentally ill offenders in jails, prisons and community corrections.

Project Deliverables: The following are the expected products and services for the project: Publish four quarterly ''News Letter'' over one calendar year; Develop a layout format and prototype of the newsletter; Develop a method and conduct a comprehensive survey of the corrections mental health field for trends and issues that can generate topics and items for the publication; Develop and maintain a targeted distribution list of corrections mental health professionals and community websites that reach these practitioners (*e.g.,* NIC Web site, CMHS GAINS Center website, National Commission on Correctional Health Care Web site, etc.); and Distribute the publication at no charge to recipients.

Publication Specifications: The newsletter publication must be designed and developed adhering to the following standards and specifications: Make available in either HTML or PDF format for electronic distribution.

Note: The format will depend on further consultation with NIC Information Center staff and NIC publications staff (must follow the Guidelines for Preparing and Submitting Manuscripts for Publication as found in the ''General Guidelines for Cooperative Agreements'' which will be included in the award package); adhere to best practice technical and editing standards and formats for this type of electronic newsletter; publication content and topics must span and attend to the interest of the broad array of correctional stakeholders including jails, prisons, and community corrections. Topics and items published must focus on current issues pertaining to corrections and mental health, and may include but not be limited to, feature articles on NIC initiatives and work, innovative work and programs, demonstrated best practices, current research trends, legal issues, scheduled events/workshops/conferences, and articles from practitioners in the field.

Work Requirements: The recipient of this cooperative agreement award must, at a minimum, do the following within the scope of performing work on this project:

Consult with the Correctional Program Specialist (CPS) assigned to manage the cooperative agreement to ensure understanding of, and agreement on, the scope of work to be performed;

Consult and work with the NIC Information Center for posting and availability through the website including the Corrections Community, Corrections News, and Blogs. The applicant can visit the NIC Web site at *http://www.nicic.gov/.*

Submit a detailed work plan with time lines and milestones for accomplishing project activities to the assigned CPS for approval prior to any work to be performed under this agreement;

Designate a point of contact, which would serve as the conduit of information and work between the CPS and the awardee;

Submit a layout and prototype to the CPS/Project Manager or designee for approval before the first edition is published.

Consult periodically with the CPS/Project Manager or designee on the proposed content for the newsletter.

Required Expertise: The successful applicant will need the skills, abilities and knowledge in the following areas: Knowledge of mental illness and mental health issues in jails, prisons and

community corrections, or be able to access such knowledge and expertise; knowledge and skill in designing, editing and publishing an electronic newsletter; knowledge and skills in soliciting content, articles and features for inclusion in the newsletter; project management experience; effective written and oral communication skills.

Application Requirements: Applications should be concisely written, typed double spaced and reference the ''NIC Opportunity Number'' and Title provided in this announcement. The application package must include: OMB Standard Form 424, Application for Federal Assistance; a cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period of fiscal year that the applicant operates under (*e.g.,* July 1 through June 30), an outline of projected costs, and the following forms: OMB Standard Form 424A, Budget Information—Non Construction Programs, OMB Standard Form 424B, Assurances—Non Construction Programs (available at *http://www.grants.gov*), and DOJ/NIC Certification Regarding Lobbying; Debarment, Suspension and Other Responsibility Matters; and Drug-Free Workplace Requirements (available at *http://www.nicic.gov/Downloads/PDF/certif-frm.pdf).*

Applications may be submitted in hard copy, or electronically via *http://www.grants.gov*. If submitted in hard copy, there needs to be an original and three copies of the full proposal (program and budget narratives, application forms and assurances). The original should have the applicant's signature in blue ink. The program narrative text must be limited to no more than 10 double spaced pages, exclusive of resumes and summaries of experience.

A sample of a prior or proposed newsletter publication including format done by the applicant is preferred as a supplement to the application. Please do not submit full *curriculum vitae.*

A Web conference will be conducted for persons with the intent to respond to the solicitation on Friday, December 18, 2009 at 12 p.m. EDT. In this conference NIC project managers will respond to questions regarding the solicitation and expectations of work to be performed. You must pre-register to attend the conference. To register for the Web conference go to: *https://nic.webex.com/nic/onstage/g.php?t=a&d=718386703* and follow the registration instructions. You will be provided further instructions for accessing the session once you have registered for the Web-conference.

Authority: Public Law 93–415.

Funds Available: NIC is seeking the applicant's best ideas regarding accomplishment of the scope of work and the related costs for achieving the goals of this solicitation. Funds may only be used for the activities that are linked to the desired outcome of the project.

Eligibility of Applicants: An eligible applicant is any private agency, educational institution, organization, individual or team with expertise in the described areas.

Review Considerations: Applications received under this announcement will be subjected to a 3 to 5 person NIC Peer Review Process.

Note: NIC will NOT award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR).

A DUNS number can be received at no cost by calling the dedicated toll-free DUNS number request line at 1–800–333–0505 (if you are a sole proprietor, you would dial 1–866–705–5711 and select option 1).

Registration in the CCR can be done online at the CCR Web site: *http://www.ccr.gov*. A CCR Handbook and worksheet can also be reviewed at the Web site.

Number of Awards: One.

NIC Opportunity Number: 10P08. This number should appear as a reference line in the cover letter, where indicated on Standard Form 424, and outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.601.

Executive Order 12372: This project is not subject to the provisions of Executive Order 12372.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. E9–29004 Filed 12–3–09; 8:45 am]

BILLING CODE 4410–36–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement: Employment Retention

AGENCY: National Institute of Corrections, Department of Justice.

ACTION: Solicitation for a Cooperative Agreement.

SUMMARY: The National Institute of Corrections (NIC) is soliciting proposals from organizations, groups, or individuals who would like to enter into an eighteen-month cooperative agreement to develop a competency-based curriculum to train Employment Retention Specialists, as well as develop an assessment instrument to address both the strengths and risks of offenders in danger of job loss.

DATES: Applications must be received by 4 p.m. EDT on Monday, December 28, 2009.

ADDRESSES: Mailed applications must be sent to: Morris L. Thigpen, Director, National Institute of Corrections, 320 First Street, NW., Room 5007, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date.

Hand delivered applications should be brought to 500 First Street, NW., Washington, DC 20534. At the front desk, dial 7–3106, extension 0 for pickup.

Faxed applications will not be accepted. Electronic applications can be submitted via *http://www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this announcement can be downloaded from the NIC Web site at *http://www.nicic.gov.* Any technical questions may be directed to Pam Davison via e-mail at *pdavison@bop.gov.* All programmatic questions concerning this announcement should be directed to Patricia E. Taylor, Correctional Program Specialist, National Institute of Corrections. She can be reached by calling 1–800–995–6425, extension 39354 or by e-mail at *petaylor@bop.gov.*

Overview: The National Institute of Corrections' (NIC) Transition and Offender Workforce Development Division (T/OWD Division) is seeking applications for the development of a competency-based, blended, e-learning and classroom training curriculum that will provide Employment Retention Specialists with the knowledge and skills needed for the provision of employment retention services for those identified as having barriers to sustained employment.

The curriculum to be used in training Employment Retention Specialists (Practitioners) will apply the cognitive-behavioral model of relapse prevention to job loss. Practitioners trained as Employment Retention Specialists will develop the competencies needed to assist offenders in analyzing the chain of events, behaviors and individual precursors that impact gainful employment and result in their separation from the workforce.

Background: Research shows a lack of employment may contribute to an offender's continued criminal activity. Additional studies show that low levels

of personal, educational, vocational, and financial achievement, and in particular, an unstable employment record, are among the predictors of continued criminal conduct. Therefore, ways of overcoming barriers to long-term employment, as a factor in the desistance to crime, warrants the development of innovative approaches for offender employment service providers.

New and effective ways of overcoming barriers to long-term employment may be found in the parallels between relapse prevention and offender employment retention. When the cognitive behavioral model of relapse prevention is applied to employment retention, the targeted behavior becomes maintained employment, and the initial lapse is the occurrence of signs. Practitioners having the competencies to assist offenders to become successful in maintaining a long-term connection to the workforce will be able to assess those at high risk for job loss, identify specific indicators and analyze the chain of events and behaviors that lead to job loss.

Purpose: The purpose of this initiative is two-fold. First, the awardee will be required to develop a competency-based, train-the-trainer curriculum for Offender Employment Retention Specialist that can be professionally endorsed and certified.

The training, delivered by a blended approach, will be the third offender workforce development knowledge block for the Division (Offender Workforce Development Specialist and Offender Employment Specialist being the other two). Knowledge blocks are a collection of knowledge on a particular subject matter that can be combined with other collections or blocks of knowledge. The concept of knowledge blocks is influenced by principles of adult learning theory and practices utilized in post-secondary education.

In addition, the awardee will be required to develop an Employment Services Inventory (ESI). This assessment tool will be used to identify precursors to job loss while creating a process to connect the targeted population to specialized services to successfully address their risk for job loss.

Scope of Work: The training curriculum will be based on a recently established needs assessment identified through the use of a DACUM (Development of a Curriculum) for Employment Retention Specialists. This DACUM assisted in the identification of the critical duty bands and job tasks of Employment Retention Specialists working with offenders.

Trainees will be taught the essential skills for facilitating (train-the-trainer) the training to other professionals that assist offenders in the development and utilization of a plan to identify and avoid high-risk situations while teaching skills to satisfactorily cope with circumstances that typically indicate impending job loss and/or result in a separation from the workforce.

The curriculum should be developed using the Instructional Theory Into Practice (ITIP) model and consist of approximately six (6) to eight (8) e-learning modules and, as necessary, classroom training. The awardee should have expertise in identifying the knowledge, skills and experience that lead to professional certification, as well as establish quality standards that would result in endorsement by a professional organization.

The awardee will be required to develop a tool/instrument to monitor and evaluate the piloted curriculum—using the captured data to adjust and/or modify the curriculum as needed. In addition, pre/post evaluations and quizzes should be developed along with a follow-up questionnaire to measure the trainees' mastery of established competencies.

Modules may address the following: Motivational Interviewing; Supportive Case Management; Employability Skills; Employment Readiness Classes/Skills; Labor Market Information; Collaboration with External Agencies; Relationships with Employers; Cognitive Behavioral Theory, and Gender Responsivity.

Required Expertise: Successful applicants will be able to demonstrate their knowledge/experience in the following areas: Offender Workforce Development; Employment Retention; Cognitive Behavioral Therapy; Behavioral Health Issues; Risk/Needs Assessment Tools; Criminogenic Needs; Strength-based Approaches; Relapse Prevention, and Professional Certification/Endorsement Procedures.

Application Requirements: Applications should be concisely written, typed double spaced (not to exceed 20 pages) and reference the project by the ''NIC Opportunity Number'' and Title in this announcement. The package must include: a cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period or fiscal year that the applicant operates under (*e.g.,* July 1 through June 30); a program narrative in response to the statement of work and a budget narrative explaining projected costs. The following forms must also be included: OMB Standard Form 424, Application for Federal Assistance; OMB Standard Form 424A, Budget information—Non-Construction Programs; OMB Standard Form 424B, Assurances—Non-Construction Programs (these forms are available at *http://www.grants.gov*) and DOJ/NIC Certification Regarding Lobbying; Debarment, Suspension and Other Responsibility Matters and the Drug-Free Workplace Requirements (available at *http://www.nicic.gov/Downloads/PDF/certif-frm.pdf.*)

Applications may be submitted in hard copy, or electronically via *http://www.grants.gov.* If submitted in hard copy, please include an original and three copies of the full proposal (program and budget narratives, application forms and assurances). The original should have the applicant's signature in blue ink.

Authority: Public Law 93–415.

Funds Available: NIC is seeking the applicant's best ideas regarding accomplishment of the scope of work and the related costs for achieving the goals of this solicitation. The final budget and award amount will be negotiated between NIC and the successful applicant. Funds may only be used for the activities that are linked to the desired outcome of the project.

This project will be a collaborative venture with the NIC's Transition and Offender Workforce Development Division and Academy.

Eligibility of Applicants: An eligible applicant is any public or private agency, educational institution, organization, individual or team with expertise in the described areas.

Review Considerations: Applications received under this announcement will be subjected to a 3 to 5 person NIC Peer Review Process. The criteria for the evaluation of each application will be as follows:

Programmatic (60%)

Is there demonstrated knowledge of—NIC's Offender Workforce Development training? offender employment barriers and offender risk/needs assessment instruments? techniques and/or interventions that successfully address offender retention issues? curriculum development and certification/endorsement procedures? Are project goals/tasks adequately discussed? Is there a clear statement of how project goals will be accomplished, to include: Major tasks that will lead to achieving the goal; the strategies to be employed; required staffing and other required resources? Are there any innovative approaches, techniques, or design aspects proposed that will enhance the project?

Organizational (20%)

Do the skills, knowledge, and expertise of the organization and the proposed project staff demonstrate a high level of competency to carry out the tasks? Does the applicant/organization have the necessary experience and organizational capacity to carry out all goals of the project? Are the proposed project management and staffing plans realistic and sufficient to complete the project within the 12-month time frame?

Project Management/Administration (20%)

Does the applicant identify reasonable objectives, milestones, and measures to track progress? If consultants and/or partnerships are proposed, is there a reasonable justification for their inclusion in the project and a clear structure to insure effective coordination? Is the proposed budget realistic and provide sufficient cost detail/narrative, and represent good value relative to the anticipated results?

Note: NIC will NOT award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR).

A DUNS number can be received at no cost by calling the dedicated toll-free DUNS number request line at 1–800–333–0505 (if you are a sole proprietor, you would dial 1–866–705–5711 and select option 1).

Registration in the CRR can be done online at the CCR Web site: *http://www.ccr.gov.* A CCR Handbook and worksheet can also be reviewed at the Web site.

Number of Awards: One.

NIC Opportunity Number: 10K121. This number should appear as a reference line in the cover letter, where indicated on Standard Form 424, and outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.601.

Executive Order 12372: This project is not subject to the provisions of Executive Order 12372.

Morris L. Thigpen,

Deputy Director, National Institute of Corrections.

[FR Doc. E9–29008 Filed 12–3–09; 8:45 am]

BILLING CODE 4410–36–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement—The Prison Rape Elimination Act (PREA) Technical Assistance Project

AGENCY: National Institute of Corrections, Department of Justice.

ACTION: Solicitation for a cooperative agreement.

SUMMARY: The National Institute of Corrections (NIC) is soliciting proposals from organizations, groups, or individuals to enter into a cooperative agreement for a 12-month period to begin in February 2010. Section 5 of the Prison Rape Elimination Act (PREA) requires NIC to provide ''training and education programs for Federal, State, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.'' NIC's technical assistance program is used to provide much of this training and education. Work under this cooperative agreement award will continue the technical assistance component of NIC's PREA Initiative.

The role of an NIC technical assistance provider is to help agencies improve operations, services, and programs. NIC funded PREA assistance builds the requester's capacity to accomplish a task or set of tasks related to addressing sexual violence and abuse in correctional settings. The assistance can range from simple delivery of information about PREA to more complex organizational reviews, assessments, and accompanying recommendations.

It is anticipated that technical assistance requests will be considered from state and local agencies charged with housing and/or supervising detained and sentenced offenders, and various Federal agencies with detention, correctional, and supervision responsibilities. Requests for PREA assistance will be submitted directly to NIC. The PREA Initiative Project Manager will review, approve, and forward the requests to the recipient of the cooperative agreement award. Although assistance provided under this award will focus on issues of inmate on inmate and staff on inmate sexual abuse and violence, NIC has other programs and initiatives that may be considered in the overall response to the request. As appropriate, the Project Manager will consult with other NIC staff regarding strategies, programs, services, or products that might also assist the requester. The Project Manager will provide initial and general guidance regarding the type of response to be provided, and may participate in early discussions with the awardee and representatives from the requesting agency to further refine the assistance response.

The applicant will submit an initial protocol that will outline the basic tasks and sub-tasks to be completed in providing technical assistance. Guidance on what should be included can be found under **SUPPLEMENTARY INFORMATION**. In addition, the applicant should include a communications plan which describes notifications, updates, and approvals between the requester, the recipient, and the NIC Project Manager. After the award is made, this protocol will be further refined as necessary and approved by NIC.

DATES: Applications must be received by 4 p.m. EDT on Monday, January 4, 2010.

ADDRESSES: Mailed applications must be sent to Director, National Institute of Corrections, 320 First Street, NW., Room 5007, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date. Hand delivered applications should be brought to 500 First Street, NW., Washington, DC 20534. At the front desk, call (202) 307–3106, extension 0 for pickup. Faxed applications will not be accepted. The only electronic applications (preferred) that will be accepted must be submitted through *http://www.grants.gov*.

FOR FURTHER INFORMATION CONTACT: A copy of this announcement and a link to the required application forms can also be downloaded from the NIC Web site at *http://www.nicic.gov.*

All technical or programmatic questions concerning this announcement should be directed to Dee Halley, CPS, Research and Evaluation Division, National Institute of Corrections.

She can be reached by calling 1–800–995–6423 ext 40374 or by e-mail at *dhalley@bop.gov.* Questions will be accepted until one week prior to the application due date. At this time responses to the questions will be posted on the NIC Web site.

SUPPLEMENTARY INFORMATION:

Protocol Elements

The applicant should design and submit an initial protocol which will guide the provision of technical assistance. The protocol should define the basic types of assistance to be provided (information delivery, training, etc.) and include time-frames,

NIC approval points, and generally describe the following elements: (1) The development of the assistance response. A key developmental activity will be the identification of specific requester goals; (2) the identification of eligible providers and their assignment to specific technical assistance projects. Consideration should be given to an individual's areas of expertise and experience and/or experience with addressing issues of sexual misconduct, abuse, or violence in correctional settings; (3) the development of an assistance work plan for each project. The assistance plan should be as detailed as possible including dates, providers, activities related to preparation, onsite work, and report development and submission. In addition to hard copies, the report and all materials related to the project must be submitted in electronic form; (4) the structure and basic content to be included in technical assistance reports. The report should follow the guidelines set out in the ''NIC Technical Assistance Policies for Technical Resource Providers'' found on the NIC Web site at *http://www.nicic.gov/TRP;* (5) what in addition to the technical assistance will be forwarded to the requester and NIC. Project materials might include, but not be limited to, agendas, participant lists, briefing packages, lesson plans, hand-outs, correspondence, and agency materials reviewed by the providers. The number of staff briefed or trained during the event should be included in the report overview or summary; (6) how technical assistance projects will be evaluated and the results reported. The award recipient will conduct evaluations immediately following or shortly after the event. It is anticipated that NIC will conduct further evaluations of selected projects to determine the agency's progress toward achieving the goals articulated in the work plan.

Technical Assistance Guidance

Although requests and responses will frequently fall into specific groups or types, requests and responses may have unique elements. In addition to the guidance provided in the ''NIC Technical Assistance Policies for Technical Resource Providers'' and the ''TA Provider Handbook'' (*http://www.nicic.gov/Downloads/PDF/Library/022876.pdf*). the following provides further information on providing PREA assistance.

General Guidance

Requesters generally ask NIC to: Deliver information about PREA; Facilitate the development of broad strategies and initiatives to address PREA, and/or help design and plan systemic responses to specific issues such as policy development, prevention, classification and orientation, security and protection, medical and mental health treatment and follow up, staff training, reporting, investigations, prosecutions, and sanctions.

Requests for Information Dissemination

Although agencies began addressing PREA issues as early as 2004, many still request basic information about the law itself. These requests can often be addressed through referral to the NIC and other web-sites. Others require onsite work. Generally, requests for information dissemination should be evaluated against the following criteria. The presentation should be at least ½ day. Depending on the length and specific content to be covered, no more than two providers should be onsite. The potential audience for conference workshops should be reasonably large. In the case of agency briefings, the audience should consist of individuals who have the authority to influence or ensure systemic changes and/or set agency policy.

Requests for Training

NIC receives numerous requests for PREA training. Responding to these requests can significantly impact PREA assistance funds. Requests for training should be evaluated against the following criteria: Training should be designed to build capacity, (developing those who will train or educate others). Such assistance might help requesters determine training needs, develop training designs and curriculum, and prepare agency staff to train on topics regarding or related to sexual misconduct, abuse, and violence. Training provided to those responsible for designing procedures, and policy development and implementation is desirable. Generally, NIC funded trainers should not return to a site for repeat sessions, or deliver pre-service or ongoing, in-service training; when possible, funds approved for training requests should be used to develop strategies and products that can be used by correctional agencies nationwide. If this is possible, the requesting agency will be made aware of, and agree to this outcome.

Requests for Assessment and Intervention

Agencies may require and request assistance in assessing their overall operation and its vulnerability to incidents of sexual offenses between inmates, or between staff and inmates. Still others experiencing a specific problem or set of problems may request assistance in identifying the source, depth, and/or impact of the problem(s), and developing an effective response.

Occasionally an agency will request assistance that goes beyond an assessment and into intervention. These types of assistance may entail activities that take the provider out of the role of ''advisor'' and involve him or her significantly in the operations of the agency. Indicators of this type of intervention may be multiple site visits, visits which last for several days, and activities which engage the provider in internal agency difficulties or disputes. Such requests will be thoroughly reviewed and the responses carefully planned with input from the NIC leadership and the PREA Project Manager.

Project Goals

Under this cooperative agreement, the recipient of the award will: (1) Develop an initial and final protocol for the provision of technical assistance; (2) deliver the projected number of technical assistance projects, and; (3) deliver through quarterly reports (a) progress on meeting the project goals, and (b) an assessment of the field's progress in addressing PREA issues.

Required Expertise

Successful applicants should be able to demonstrate that they have the organizational capacity to carry out all of the project goals, experience in correctional policy and practice, and knowledge of PREA, the proposed standards forwarded by the National Prison Rape Elimination Commission to the U.S. Attorney General for consideration, and various strategies to address the issue of sexual violence and abuse in correctional settings.

Application Requirements: The application should be concisely written, typed double spaced and reference the ''NIC Opportunity Number'' and Title provided in this announcement. Please limit the program narrative text to 20 double spaced pages, exclusive of resumes (do not submit full curriculum vitae) and summaries of organizational experience. The application package must include: OMB Standard Form 424, Application for Federal Assistance, a cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period or fiscal year that the applicant operates under (*e.g.,* July 1 through June 30), a program narrative responding to the requirements in this announcement, a description of the qualifications of the applicant(s), an outline of projected

costs, and the following forms: OMB Standard Form 424A, Budget Information—Non Construction Programs, OMB Standard Form 424B, Assurances—Non Construction Programs (these forms are available at grants.gov), DOJ/NIC Certification Regarding Lobbying; Debarment, Suspension and Other Responsibility Matters; and Drug-Free Workplace Requirements (available at *http://www.nicic.gov/Downloads/PDF/certif-frm.pdf.*). Additional Resources: Go to *http://www.nicic.gov.*

Applications may be submitted in hard copy, or electronically via *http://www.grants.gov.* If submitted in hard copy, there needs to be an original and three copies of the full proposal (program and budget narratives, application forms and assurances). The original should have the applicant's signature in blue ink.

Authority: Public Law 93–415.

Funds Available and Budget Considerations: Up to $150,000 is available for this project, but preference will be given to applicants who provide the most cost efficient solutions in accomplishing the scope of work. Determination will be made based on best value to the Government, not necessarily the lowest bid. Funds may only be used for the activities that are directly related to the project.

NIC will not specify the number of events to be completed. In developing the proposed budget, applicants should estimate the average cost for a technical assistance project, to include the number of providers, the overall number of fee days, airfares, and travel and miscellaneous expenses. The applicant should estimate the number of technical assistance projects to be completed.

This project will be a collaborative venture with the NIC Research and Evaluation Division.

Eligibility of Applicants: An eligible applicant is any public or private agency, educational institution, organization, individual or team with expertise in the described areas.

Review Considerations: Applications received under this announcement will be subject to the NIC Review Process. The criteria for the evaluation of each application will be as follows:

Programmatic (40%)

Is the required protocol (Goal 1) included and reflective of the applicants understanding of the project? Are all of the protocol elements present and sufficiently detailed to offer a clear understanding of how each of the tasks will be accomplished? Are Project Goals Two and Three adequately discussed?

Organizational (35%)

Do the skills, knowledge, and expertise of the organization and the proposed project staff demonstrate a high level of competency to carry out the tasks? Does the applicant organization have the necessary experience and organizational capacity to carry out all three goals of the project? Are the proposed project management and staffing plans realistic and sufficient to complete the projected number of technical assistance projects within the time frames proposed?

Project Management/Administration (25%)

Does the applicant identify reasonable objectives, milestones, and measures to track progress? If consultants and/or partnerships are proposed, is there a reasonable justification for their inclusion in the project and a clear structure to insure effective coordination? Is the proposed budget realistic, provide sufficient cost detail/narrative, and represent good value relative to the anticipated results?

Note: NIC will NOT award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR).

A Duns number can be received at no cost by calling the dedicated toll-free DUNS number request line at 1–800–333–0505 (if you are a sole proprietor, you would dial 1–866–705–5711 and select option 1).

Registration in the CCR can be done online at the CCR Web site: *http://www.ccr.gov.* A CCR handbook and worksheet can also be reviewed at the Web site.

Number of Awards: One.

NIC Opportunity Number: 10PEI35. This number should appear as a reference line in the cover letter, where indicated on Standard Form 424, and outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.603.

Executive Order 12372: This program is subject to the provisions of Executive Order 12372. E.O. 12372 allows states the option of setting up a system for reviewing applications from within their states for assistance under certain Federal programs. Applicants (other than Federally-recognized Indian tribal governments) should contact State Single Point of Contact (SPOC), a list of which can be found at *http://www.whitehouse.gov/omb/grants/spoc.html.*

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. E9–29011 Filed 12–3–09; 8:45 am]

BILLING CODE 4410–36–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Emergency Mine Evacuation

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506 (c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection related to Emergency Mine Evacuation: 30 CFR 48.3—Training plans; time of submission; where filed; information required; time for approval; method for disapproval; commencement of training; approval of instructors; 30 CFR 75.1502—Mine emergency evacuation and firefighting program of instruction; 30 CFR 75.1504—Mine emergency evacuation training and drills; 30 CFR 75.1505—Escapeway maps. 30 CFR 75.1714–3—Self-rescue devices; inspection, testing, maintenance, repair, and recordkeeping; 30 CFR 75.1714–5—Map locations of self-contained self-rescuers (SCSRs); 30 CFR 75.1714–8—Reporting SCSR inventory and malfunctions; retention of SCSRs.

DATES: Submit comments on or before February 2, 2010.

ADDRESSES: Send comments to U.S. Department of Labor, Mine Safety and Health Administration, John Rowlett, Director, Management Services Division, 1100 Wilson Boulevard, Room 2134, Arlington, VA 22209–3939.

Commenters are encouraged to send their comments via e-mail to *Rowlett.John@dol.gov.* Mr. Rowlett can be reached at (202) 693–9827 (voice), or (202) 693–9801 (facsimile).

FOR FURTHER INFORMATION: Contact the employee listed in the **ADDRESSES** section of this notice.

SUPPLEMENTARY INFORMATION:

I. Background

The Mine Safety and Health Administration (MSHA) issued a final rule addressing emergency mine evacuation in 2006. This regulation included requirements for immediate accident notification applicable to all mines. In addition, it contained requirements for new and expanded training, including evacuation drills; self-contained self-rescuer (SCSR) storage, training, and use; and the installation and maintenance of lifelines in underground coal mines.

Submission of training plans and programs of instruction and certification that training was done provides MSHA, operators, and miners with confidence that training is appropriate and was conducted as necessary, particularly when MSHA is not able to be at the mine. Without adequate training, miners may sustain serious or even fatal injuries because they lack the knowledge to properly and safely perform various tasks and activities or evacuate a mine.

If inspections and monitoring of SCSRs did not occur, this could allow unsafe conditions to go undetected and the SCSRs might not be usable when needed. This would endanger miners' safety.

If operators were not required to submit an SCSR inventory or to notify MSHA when they encounter an SCSR defect, performance problem, or malfunction, MSHA would not have the information needed to notify other mines that may also use the affected SCSRs. This could endanger miners because operators could continue to rely on deficient SCSRs.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **ADDRESSES** section of this notice, or viewed on the Internet by accessing the MSHA home page (*http://www.msha.gov/*) and selecting ''Rules & Regs'', and then selecting ''FedReg. Docs''. On the next screen, select ''Paperwork Reduction Act Supporting Statement'' to view documents supporting the **Federal Register** Notice.

III. Current Actions

Information collected is used by the mine operator and MSHA to ensure that underground coal operators modify their training plans whenever they modify their program of instruction. This will ensure that newly hired miners receive the same level of training as is required for other miners. Operators use part 48 training plans to train each miner about the safety and health aspects of the mining environment and the tasks associated with the miner's job. MSHA uses the plans to ensure that all miners are receiving training necessary to perform their jobs in a safe manner.

MSHA requires underground coal operators to submit a Mine Emergency Evacuation and Firefighting Program of Instruction to the District Manager for approval. Upon approval by the MSHA District Manager, the operator uses the approved program of instruction to implement programs for training miners in responding appropriately to mine emergencies. MSHA uses the plans to ensure that the operator's program will provide the required training and drills to all miners.

MSHA requires the operator to certify the training and drill for each miner at the completion of each quarterly drill, annual expectations training, or other training, and that a copy be provided to the miner upon request. These certifications are used by MSHA, operators, and miners as evidence that the required training has been completed.

MSHA requires that escapeway maps show the SCSR storage locations. Accurate and up-to-date maps are essential to the engineering plans and safe operation of mines and to the health and safety of the miners. MSHA and other emergency evacuation personnel will use the notations on the maps should a rescue or recovery operation be necessary. Miners use the escapeway maps in training and during mine evacuations. Escapeway maps are required to be posted or readily accessible for all miners in each working section, areas where mechanized mining equipment is being installed or removed, at surface locations where miners congregate and in each refuge alternative.

MSHA requires that persons that test Self-Contained, Self-Rescuers (SCSRs) certify that the tests were done and record all corrective actions. MSHA inspectors use these records to determine compliance with the standards. It includes requirements for compiling, maintaining, and reporting an inventory of all SCSRs at the mine, and for reporting defects, performance problems, or malfunctions with SCSRs. This will assure that MSHA can investigate SCSR problems, if necessary, notify other users of these problems before accidents occur and require manufacturers to address potential problems with these critical devices:

Type of Review: Extension.
Agency: Mine Safety and Health Administration.
Title: Emergency Mine Evacuation.
OMB Number: 1219–0141.
Frequency: On Occasion.
Affected Public: Business or other for-profit.
Respondents: 1,084,830.
Total Responses: 622.
Total Burden Hours: 7,836 hours.
Total Burden Cost: $68,528.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated at Arlington, Virginia, this 30th day of November 2009.

John Rowlett,

Director, Management Services Division.

[FR Doc. E9–28893 Filed 12–3–09; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Employment and Training Administration

Filing Locations for Foreign Labor Certification Program Temporary Program Applications; Change of Address

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice.

SUMMARY: This Notice announces a change in the location where applications for temporary labor certification programs will be filed and/or are being processed.

DATES: This notice is effective on December 15, 2009.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; telephone: (202) 693–3010 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Foreign Labor Certification (OFLC) provides national leadership and policy guidance, and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the Immigration and Nationality Act (INA) concerning foreign workers seeking admission to the United States (U.S.) in order to work under the labor certification programs authorized by the INA. In carrying out its statutory responsibility, OFLC administers both temporary nonimmigrant labor certification programs and the permanent immigrant labor certification program. The Secretary of Labor issues certifications in connection with several nonimmigrant visa programs as well as the permanent program. To obtain a labor certification under most labor certification programs administered by OFLC, employers must demonstrate that there are insufficient U.S. workers available, willing, and qualified to perform the work, and that the wage offered to the foreign worker(s) will not adversely impact U.S. workers similarly employed. The purpose of the labor certification process is to ensure that admitting foreign workers does not adversely affect job opportunities, wages and working conditions of U.S. workers. These activities are carried out in two National Processing Centers (NPC), one in Atlanta, GA and one in Chicago, IL.

The Chicago NPC is responsible for adjudicating all employer applications for temporary labor certification under the H–1B, H–1B1, E–3, H–2A, H–2B, H–1C, and D–1 programs. The purpose of this Notice is to inform the public about a change of address for the Chicago NPC.

The address change will be effective as of the effective date of this Notice. On that date, the Chicago NPC should be fully functional in the new location. For 3 weeks after that date, the Chicago NPC will receive via courier all written correspondence submitted to their former address. This is to ensure a smooth transition and allow all interested parties to commence using the new address. On January 6, 2010, the courier will cease to operate and all submissions to the former address of the Chicago NPC will be returned to the sender.

II. Address

Old Address: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, 844 North Rush Street, 12th Floor, Chicago, IL 60611; telephone: (312) 886–8000; facsimile: (312) 353–3352.

New Address: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, 536 South Clark Street, Chicago, IL 60605–1509; telephone: (312) 886–8000; facsimile: (312) 353–3352.

New Address in connection with fees: The following address is to be used for all invoices/fees submitted in connection with the H–2A and H–1C programs: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, P.O. Box A3804, Chicago, IL 60690–A3804.

Signed in Washington, DC, this 25th day of November 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. E9–28954 Filed 12–3–09; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF LABOR

Employment and Training Administration

Prevailing Wage Determinations for Use in the H–1B, H–1B1 (Chile/Singapore), H–1C, H–2B, E–3 (Australia), and Permanent Labor Certification Programs; Prevailing Wage Determinations for Use in the Commonwealth of the Northern Mariana Islands

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department) is providing notice that, in accordance with its labor certification regulations, as of January 1, 2010, the Office of Foreign Labor Certification (OFLC) National Prevailing Wage and Helpdesk Center (NPWHC) in Washington, DC, will receive and process prevailing wage determination (PWD) requests for use in the H–1B, H–1B1 (Chile/Singapore), H–1C, H–2B, E–3 (Australia), and permanent labor certification programs. In addition, the Department is providing guidance about the implementation of the issuance of PWDs for applications in the Commonwealth of the Northern Mariana Islands (CNMI).

DATES: This Notice is effective November 28, 2009, for PWD requests for job opportunities in the Commonwealth of the Northern Mariana Islands; and January 1, 2010, for all other PWD requests.

ADDRESSES: None.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Administrator, Office of Foreign Labor Certification, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; telephone: (202) 693–3010 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 19, 2008, the Department published a Final Rule addressing the Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes, 73 FR 78020, Dec. 19, 2008. The Final Rule implemented a federalized process for obtaining PWD requests for use in the H–2B temporary nonagricultural labor certification program directly from the Employment and Training Administration's (ETA) appropriate National Processing Center (NPC)—which was designated as the Chicago NPC in the preamble to the Final Rule. Beginning on January 1, 2010, the Final Rule also federalized PWD for use in the H–1B, H–1B1 (Chile/Singapore), H–1C, E–3 (Australia), and the permanent labor certification programs.

Effective on January 1, 2010, the processing of all PWD requests for the above-referenced labor certification programs will be centralized in OFLC's NPWHC in Washington, DC. The NPWHC will receive and process PWD requests in accordance with the applicable regulations and Department guidance. The one exception to this is PWD requests for CNMI; the NPWHC will begin receiving and processing those effective November 28, 2009.

The CNMI is an unincorporated territory of the United States (U.S.) whose relationship with the U.S. is governed by the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Public Law 94–241, 90 Stat. 263 (1976), as amended (Covenant). The Covenant was recently modified by Congress in Title VII of the Consolidated Natural Resources Act, Public Law 110–229, Title VII, Subtitle A, 122 Stat. 754, 853 (2008) (CNRA). The CNRA applies the Immigration and Nationality Act (INA) and other U.S. immigration laws to the CNMI beginning on November 28, 2009, with a transition period that will end on December 31, 2014, unless certain provisions are extended by the Department.

The CNMI Department of Labor, as of November 28, would normally be charged with the issuance of PWDs under the various regulations governing such determinations. Since there is very little time between November 28, 2009, and January 1, 2010, the Department has determined it is more feasible for the Department to receive such requests directly rather than have the CNMI receive and process such requests. All requests for a PWD for a job opportunity on CNMI made in connection with a potential filing in a labor certification program must be made in the manner described in ''Filing Procedures,'' below.

Regulations

All employers submitting PWD requests and related actions must follow the prevailing wage requirements set forth in 20 CFR 655.10, 655.11, 655.731, 655.1112, 656.40 and 656.41, as applicable.

Filing Procedures

a. PWD Requests

1. Requestors must submit PWD requests using the Application for Prevailing Wage Determination, Form ETA–9141.

2. Requestors must submit PWD requests to the NPWHC by U.S. Mail or comparable physical delivery service at the following address: U.S. Department of Labor-ETA, National Prevailing Wage and Helpdesk Center, Attn: PWD Request; 1341 G Street, NW., Suite 201, Washington, DC 20005–3142.

Note: On and after November 28, 2009, for the CMNI and on and after January 1, 2010, the NPWHC will only process PWD requests received by mail in hard copy.

The Department is in the process of developing an electronic means for the submission of PWD requests and will publish a notice in the **Federal Register** informing the public when such a process becomes available.

3. Employer Provided Wage Documentation for H–1B, H–2B and Permanent Labor Certification Programs.

The NPWHC will consider wage information provided by the employer in making a PWD. Where not present in the survey submitted, an employer should provide the following information pertaining to its survey, except when McNamara-O'Hara Service Contract Act (SCA) or Davis Bacon Act (DBA) wages have been requested.

i. The name of the published survey, when appropriate;

ii. The publication schedule for the survey, when appropriate. This should include the publication date of the requested survey, the date of the previous version of the survey and the date of the next release of the survey (actual or anticipated);

iii. When the data was collected;

iv. A description of the job duties or activities used in the survey;

v. The methodology used in the survey;

A. How the universe is defined;

B. How the sample size was determined;

C. How the participants were selected; and

1. The number of employers surveyed for the occupation in the area;

2. The number of wage value responses (employees) for the occupation in the area;

D. A list of employer participants or explanation of how the cross industry nature of the survey was maintained;

E. How the presented wage was determined and if it is mean or median;

F. Any other appropriate information on the survey's methodology;

G. The area covered by the survey or relevant portion and an explanation of any expansion of the area beyond normal commuting distance, when applicable;

4. Employer-Provided Wage Documentation for SCA/DBA.

No employer-provided wage documents are initially required for SCA/DBA wage rate requests but NPWHC staff may require the requestor to submit additional documentation, if needed to make a PWD.

b. Redeterminations

All requests for prevailing wage redeterminations must be sent to the: U.S. Department of Labor-ETA; National Prevailing Wage and Helpdesk Center, Attn.: PW Redetermination, 1341 G Street, NW., Suite 201, Washington, DC 20005–3142.

c. OFLC Review

Requests for OFLC review or PWD challenges must be mailed to the: U.S. Department of Labor-ETA; National Prevailing Wage and Helpdesk Center; Attn.: PWD Review, 1341 G Street, NW., Suite 201, Washington, DC 20005–3142.

d. BALCA Review of PWDs

For all programs, requests for review by the Board of Alien Labor Certification Appeals (BALCA) must be in writing and must be made no more than 30 days after determination. Employers must send their requests for BALCA review to the following address: U.S. Department of Labor-ETA, National Prevailing Wage and Helpdesk Center, Attn.: PWD Appeal, 1341 G Street, NW., Suite 201, Washington, DC 20005–3142.

e. State Workforce Agencies and Chicago NPC to Cease Processing PWD Requests Received on and After January 1, 2010

State Workforce Agencies (SWAs) and the Chicago NPC, where PWD requests are currently submitted, will complete any PWD requests received on or prior to December 31, 2009. The Chicago NPC or SWA will maintain responsibility for processing PWD requests and review requests (including all challenges and appeals) under 20 CFR 656.40 or 656.41 or 20 CFR 655.10 or 655.11, as appropriate, so long as the original PWD request was received on or prior to December 31, 2009.

Any PWD request, using the ETA Form 9141, received from January 1, 2010, up to and including January 15, 2010, will be forwarded by the SWA or the Chicago NPC to the NPWHC. Requests received after January 15, 2010, will be returned to the requestor with a cover letter that includes instructions on where to send the request and where to obtain a copy of the ETA–9141.

Signed in Washington, DC, this 25th day of November 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. E9–28963 Filed 12–3–09; 8:45 am]

BILLING CODE 4510–FP–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of

these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 4201 Wilson Blvd., Arlington, Virginia 22230.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF Web site: *http://www.nsf.gov.* This information may also be requested by telephoning, 703/292–8182.

Dated: December 1, 2009.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E9–28943 Filed 12–3–09; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by January 4, 2010. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy at the above address or (703) 292–7405.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. Applicant

Permit Application No. 2010–021
Sam Feola, Raytheon Polar Services Company, 7400 South Tucson Way, Centennial, CO 80112.

Activity for Which Permit is Requested

Enter Antarctic Specially Protected Areas. The applicant plans to enter Cape Crozier (ASPA 124) to conduct occasional operations, maintenance, construction and rehabilitation to open and close facilities used for scientific research.

Location

Cape Crozier (ASPA 124).

Dates

January 1, 2009 to September 20, 2014.

2. Applicant

Permit Application No. 2010–022
Paul Morin, Department of Geology and Geophysics, University of Minnesota, Minneapolis, MN 55455.

Activity for Which Permit is Requested

Enter Antarctic Specially Protected Areas. The applicant proposes to enter Cape Crozier (ASPA 124), Cape Royds (ASPA 121), and Cape Bird, Ross Island to collect ground control points (GCP) as part of a project to accurately rectify high-resolution satellite imagery in the McMurdo Sound region. The high-resolution satellite imagery is used for planning, logistics, search and rescue maps, and scientific analysis. In order to assure the highest accuracy possible, these images need to be corrected by locating reliable, distinguishable features on the ground.

Location

Cape Crozier (ASPA 124), Cape Royds (ASPA 121), and Cape Bird, Ross Island.

Dates

January 7–14, 2010.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. E9–28949 Filed 12–3–09; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–10; NRC–2009–0534]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact; For the Amendment of U.S. Nuclear Regulatory Commission License No. SNM–2506 for Prairie Island Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Availability.

FOR FURTHER INFORMATION CONTACT: Kellee Jamerson, Environmental Project Manager, Environmental Review Branch, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission (NRC), Rockville, Maryland 20852. Telephone: (301) 415–7649; Fax: (301) 415–5370; E-mail: *Kellee.Jamerson@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated March 28, 2008, as supplemented August 29, 2008, Northern States Power Company (NSP), formerly Nuclear Management Company, LLC, submitted a request to the NRC to amend materials license SNM–2506 for the Prairie Island Independent Spent Fuel Storage Installation (PIISFSI). The license amendment request proposes the design modification of the TN–40 cask to the TN–40HT cask. The modified cask design will accommodate the dry

storage of fuel with higher initial uranium-235 enrichment and higher burnup. The ISFSI is located within the site boundary of the Prairie Island Nuclear Generating Plant (PINGP) within the city limits of Red Wing, Minnesota. Under license SNM–2506, NSP is authorized to receive, possess, store, and transfer spent fuel to the PIISFSI under the provisions in 10 CFR part 72. The PIISFSI, operated by Xcel Energy Inc., has been conducting operations under a site-specific license since October 1993. As the plant's owner, NSP has the exclusive right to the energy generated by PINGP. As part of its evaluation of the proposed action, the NRC has prepared an environmental assessment (EA), which is summarized below. Based on the EA, the NRC has concluded that a finding of no significant impact (FONSI) is appropriate. The NRC plans to approve the requested amendment to license SNM–2506 following the publication of this EA summary and FONSI in the **Federal Register**.

II. EA Summary

Description of the Proposed Action

The objective of NSP is to modify the current cask design to the TN–40HT model, which will accommodate dry storage of fuel with higher initial enrichment and higher burnup. The current TN–40 cask limits the fuel that may be stored to that of an initial enrichment of <3.85 wt% of uranium-235 and a burnup of <45,000 Mega Watt-days/Metric Ton of Uranium (MWd/MTU). To accommodate higher uranium-235 enrichment and higher burnup of fuel, modifications to the cask design are required to support operation during the plant life extension. The enhancements involve features that improve heat transfer and neutron absorption. The heat transfer capability of the basket design must be enhanced as well as minor changes to the cask body to accommodate the enhanced basket. The changes being made to the cask design are such that the TN–40HT cask will use existing equipment for lifting, loading, and transporting. The EA addresses the expected environmental impacts associated with the proposed design modification of the ISFSI cask on the Prairie Island site.

Environmental Impacts of the Proposed Action

The NRC staff has concluded that the proposed action will not result in a significant impact to human health or the environment. To support this conclusion, NRC staff has prepared an EA, which evaluated the direct, indirect, and cumulative environmental impacts of modifying the ISFSI cask design. Based on this assessment, the NRC staff has determined that no significant radiological or non-radiological impacts from normal operations of the ISFSI with the newly designed cask are expected. The ISFSI is a passive facility that produces no liquid or gaseous effluents and requires no power or regular maintenance. The license amendment request does not require altering the site footprint nor does it change the operating processes of the existing facility.

The radiological dose rates from the ISFSI will be limited by the design of the dry storage cask. Occupational dose estimates from routine monitoring activities and transfer of spent fuel for disposal must be maintained as low as reasonably achievable (ALARA) and must be within the limits of 10 CFR 20.1201. The annual dose to the nearest member of the public from ISFSI activities remains significantly below the annual dose limits specified in 10 CFR 72.104 and 10 CFR 20.1301(a). The cumulative dose to an individual offsite from all site activities will be less than the limits specified in 10 CFR 72.104 and 10 CFR 20.1301. Therefore, the NRC staff concludes that the proposed action will not result in a significant impact to human health or the environment.

Because of its proximity to the plant and the uniqueness of the community, the NRC acknowledges that there is the potential for the Prairie Island Indian Community (PIIC) to be disproportionately affected by the PIISFSI. Potential impacts to minority and low-income populations would mostly consist of radiological effects; however, radiation doses from the modified TN–40 cask design at the PIISFSI would be well below regulatory limits. Therefore, based on this information and the analysis of human health and environmental impacts presented in the EA, the proposed modification would not have disproportionately high and adverse human health and environmental effects on minority and low-income populations residing near the PIISFSI.

Agencies and Persons Contacted

The consultations ensured that the requirements of Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act were met. The consultations also provided the designated state liaison agency the opportunity to comment on the proposed action. NRC staff consulted with other agencies regarding the proposed action, including the U.S. Fish and Wildlife Service (FWS), the Minnesota State Historic Preservation Office, and the Minnesota Department of Natural Resources (MNDNR). The NRC received responses from the FWS and the MNDNR. The NRC also considered the concerns of interested stakeholders, namely the PIIC, throughout the review process. NRC staff incorporated such responses and concerns from these agencies into the final text of the EA. The conclusions by all agencies consulted were consistent with the staff's conclusions.

III. Finding of No Significant Impact

On the basis of the EA, the NRC staff concludes that there are no significant radiological or non-radiological impacts associated with the proposed action. The issuance of the license amendment for the design change of the spent nuclear fuel dry storage cask at the Prairie Island ISFSI will have no significant impact on the quality of the human environment. Therefore, pursuant to 10 CFR 51.31 and 51.32, a finding of no significant impact is appropriate and an environmental impact statement need not be prepared for the amendment of materials license SNM–2506.

IV. Further Information

Documents related to this action, including the license amendment request of SNM–2506 and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are:

Document	ADAMS Accession No.
PI ISFSI License Amendment Request.	ML081190039
NRC Letter to Minnesota SHPO.	ML083300097
NRC Letter to Prairie Island Indian Community.	ML083450661
NRC Letter to FWS	ML083290624
FWS Email to NRC	ML090260631
Environmental Assessment	ML093080494

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 24th day of November 2009.

For the Nuclear Regulatory Commission.

William Ford,

Acting Chief, Environmental Review Branch, Environmental Protection and Performance Assessment Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. E9–28975 Filed 12–3–09; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Privacy Act of 1974, Computer Matching Program—United States Postal Service and the Defense Manpower Data Center, Department of Defense

AGENCY: Postal Service.

ACTION: Notice of Computer Matching Program—United States Postal Service and the Defense Manpower Data Center, Department of Defense.

SUMMARY: The United States Postal Service® (USPS®) plans to participate as a source agency in a computer matching program with the Defense Manpower Data Center (DMDC), Department of Defense (DoD). The purpose of this agreement is to verify continuing eligibility for the TRICARE Reserve Select Program (TRS) by identifying TRS recipients who are eligible for or receiving health coverage under Federal Employee Health Benefits (FEHB), and to terminate TRS benefits if appropriate.

DATES: The matching program will begin on the effective date of the agreement. The effective date is the expiration of a 40-day review period by OMB and Congress or 30 days after the date of publication of this notice, whichever is later. The matching program will be valid for a period of 18 months after this date.

ADDRESSES: Written comments on this proposal should be mailed or delivered to the Records Office, United States Postal Service, 475 L'Enfant Plaza, SW., Room 5846, Washington, DC 20260. Copies of all written comments will be available at the above address for public inspection and photocopying between 8 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Jane Eyre at (202) 268–2608.

SUPPLEMENTARY INFORMATION:

The Postal Service and DMDC have agreed to conduct a computer matching program under subsection (o) of the Privacy Act of 1974, 5 U.S.C. 552a. The USPS® is undertaking this initiative to assist the DMDC in fulfilling a mandate issued under the John Warner National Defense Authorization Act of 2007 (NDAA of 2007) (Pub. L. 109–364). This Act established the enhanced TRS program as of October 1, 2007, while excluding Selected Reserve members eligible for Federal Employee Health Benefits (FEHB) under chapter 89 of title 5, U.S. Code, from participation in TRS.

The Postal Service has agreed to assist the DMDC in its efforts to identify individuals who are not entitled to receive health coverage under TRS. Currently, upon initial enrollment into TRS, service members must certify that they are not eligible for FEHB in order to purchase TRS health care insurance coverage. TRS has no termination date. The parties to this agreement have determined that a computer matching program is the most efficient, expeditious, and effective means of identifying ineligible TRS recipients who are eligible for or receiving health coverage under FEHB. Absent the matching agreement, DoD would have to recertify the enrolled population every year. Manual verification of Federal employment information would be an unnecessary and burdensome process and a significant expense for the DoD. Additionally, it is possible that not all affected individuals would be identified. There are no other consolidated data sources available containing this type of information.

The match will compare systems of records maintained by the respective agencies under the Privacy Act of 1974, from which records will be disclosed for the purpose of this computer match. The Postal Service's Personnel Compensation and Payroll Records (USPS System of Records (SOR) 100.400) will be compared with a file of records of Selected Reserve members who are enrolled in the TRS. These disclosures are authorized by a Privacy Act routine use. This routine use, identified as routine use 7, is applicable to the payroll system of records as well as other personnel systems, and permits disclosures to federal and state agencies when the record is needed by the Postal Service or another agency to determine employee participation in, and eligibility under, particular benefit programs administered by those agencies. The DMDC will use the systems of records identified as DMDC 02, ''Defense Enrollment Eligibility Reporting System (DEERS)'' as amended by 74 FR 18356 (April 22, 2009). Routine use 22(1) provides the DoD with the FEHB eligibility and Federal employment information necessary to determine continuing eligibility for the TRS program.

The DMDC will provide semi-annual data to be used in the match, including Social Security Numbers, names, and dates of birth for TRS-enrolled Selected Reservists. The USPS® will submit to the DMDC a file of matches against the USPS Payroll database.

The DMDC will update the database with the USPS FEHB eligibility information and will provide the matching results to the responsible Reserve Component. The responsible Reserve Component is responsible for verifying the information and making final determinations as to positive identification and eligibility for TRS benefits.

This computer match may have an adverse effect on individuals that are identified from the match. After verifying the accuracy of the matching information and determining ineligibility for coverage under TRS, the DoD will immediately notify individuals of their ineligibility for TRS and inform them at the same time about procedures for enrolling in FEHB. This process will help to alleviate or minimize any break in medical coverage.

The privacy of employees will be safeguarded and protected. The USPS® will manage all data in strict accordance with the Privacy Act and the terms of the matching agreement. Any verified data that is maintained will be managed within the parameters of Privacy Act System of Record USPS® 100.400, Personnel Compensation and Payroll Records (last published April 29, 2005 (70 FR 22548)).

The USPS® will provide 40 days of advance notice to Congress and postal employee unions for each subsequent matching agreement. Set forth below are the terms of the matching agreement (exclusive of attachments), which provide information required by the Privacy Act of 1974, as amended (5 U.S.C. 552a), OMB Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988, 54 FR 25818 (June 19, 1989), and OMB

Circular No. A–130, Appendix I, 65 FR 77677 (December 12, 2000).

Stanley F. Mires,

Chief Counsel, Legislative.

Computer Matching Agreement Between the United States Postal Service and the Defense Manpower Data Center, Department of Defense

A. Purpose of the Computer Matching Agreement (CMA)

The purpose of this agreement is to establish the conditions, safeguards and procedures under which the United States Postal Service (USPS), an independent establishment of the executive branch of the Government of the United States, section 201 title 39, United States Code (U.S.C.) USPS Payroll, will disclose Federal Employees Health Benefits (FEHB) eligibility to the Defense Manpower Data Center (DMDC), Defense Enrollment and Eligibility Reporting System Office (DEERS), and the Office of the Assistant Secretary of Defense, Reserve Affairs (OSD/RA). This disclosure by USPS will provide the DoD with the FEHB eligibility and Federal employment information necessary to determine continuing eligibility for the TRICARE Reserve Select (TRS) program.

Section 1076d of title 10, U.S.C. requires the Department of Defense to discontinue eligibility for TRS for those Selected Reserve members who are eligible for health care benefits under chapter 89 of title 5, U.S.C. This CMA will allow a file of records of Selected Reserve members, who are enrolled in the TRS, to match the USPS Payroll to determine eligibility for the FEHB Program. USPS will return the results of the computer match to DMDC, providing the FEHB eligibility information on records that match to their database. DMDC will provide information to the Reserve Components (RCs) for due process on only those members with FEHB eligibility that are currently enrolled in TRS.

This computer matching agreement supersedes all existing data exchange agreements between USPS and DMDC, for the exchange of personal data for purposes of disclosing eligibility information for FEHB.

B. Legal Authority

This CMA is executed to comply with the Privacy Act of 1974 (section 552a title 5, U.S.C.), as amended, (as amended by Public Law (Pub. L.) 100–503, the Computer Matching and Privacy Protection Act (CMPPA) of 1988), the Office of Management and Budget (OMB) Circular A–130, titled ''Management of Federal Information Resources'' at 61 **Federal Register** (FR) 6435 (February 20, 1996), and OMB guidelines pertaining to computer matching at 54 Fed. Reg. 25818 (June 19, 1989). The Postal Service is authorized to enter into this Agreement by section 411 title 39, U.S.C.

The John Warner National Defense Authorization Act of 2007 (NDAA of 2007) (Pub. L. 109–364) established the enhanced TRS program as of October 1, 2007 while excluding those Selected Reserve members, who are eligible for FEHB under chapter 89 of title 5, U.S.C., from participation in TRS. This agreement implements the additional validation processes needed by DoD to insure Selected Reserve members eligible for FEHB are not enrolled in TRS.

This CMA will allow DoD to accomplish its mandate. There are no other data sources available with this consolidated type of FEHB eligibility information. Manual verification by units of Federal employment information would be an unnecessary and burdensome process and a significant expense for the DoD. The use of computer technology to transfer data between USPS Payroll and DEERS is faster and more efficient than the use of any other manual processes.

C. Definitions

(1) USPS Payroll means the United States Postal Service Payroll processing unit in Eagan, MN.

(2) DEERS means Defense Enrollment Eligibility and Reporting System.

(3) Recipient Agency, as defined by the Privacy Act (section 552a (a) (9) title 5 U.S.C.), means the agency receiving the records and actually performing the computer match; *i.e.,* the matching agency, USPS.

(4) Source Agency, as defined by the Privacy Act (section 552a (a) (11) title 5, U.S.C.), means the agency initially disclosing the records for the purpose of the match; *i.e.,* DMDC.

(5) DoD means Department of Defense.

(6) DMDC means the Defense Manpower Data Center.

(7) FEHB means Federal Employees Health Benefits Program.

(8) TRS means TRS, a premium based TRICARE military health care program for Selected Reservists.

(9) OSD/RA means the Office of the Secretary of Defense for Reserve Affairs.

D. Description of the Match and Records

Under the terms of this matching agreement, DMDC will provide to USPS Payroll a file consisting of social security numbers (SSN), dates of birth (DOB), and names of Selected Reserve members enrolled in TRS. DMDC will update their database with FEHB eligibility information from the USPS response file. DMDC will be responsible for providing the verified information to the Reserve components for determining TRS eligibility.

USPS agrees to conduct a semi-annual computer match of the SSNs of Selected Reservists enrolled in TRS provided by DMDC's DEERS against the information found in the USPS personnel system of record for career USPS employees. USPS will validate the identification of the Selected Reserve record that matches against the SSN, DOB, and name provided by DMDC. USPS will provide an FEHB Eligibility Code, a multiple record indicator and a DOB match indicator. USPS will forward a response file to DMDC within 30 business days following the receipt of the initial finder file and for any subsequent files submitted.

E. Justification and Anticipated Results

(1) Justification. The National Defense Authorization Act of Fiscal Year 2007 (NDAA FY–07) (Pub. L. 109–364) simplified the TRS program and provided a 28% premium share of the total cost for all Selected Reserve members enrolled in the program as of October 1, 2007. Under the new law a member of the Selected Reserve who is eligible for the FEHB Program under chapter 89 of title 5, U.S.C. is not eligible for the TRS program. In order to effectively administer the program, DoD has a requirement to have a verified source of FEHB eligibility.

Upon initial enrollment into TRS service members must certify they are not eligible for FEHB in order to purchase TRS health care insurance coverage. Since there is no mandatory termination date for TRS, DoD will validate the eligibility status of the member on a semi-annual basis with USPS Payroll. Absent the matching agreement, it would be necessary for the enrolled Selected Reserve population to recertify every year. This would be an unnecessary process for beneficiaries as well as a significant expense for DoD. The use of computer technology to transfer data between DMDC and USPS is faster and more efficient than the use of any other manual process.

(2) Anticipated Results. The data provided by USPS will be used in conjunction with DMDC data, to identify beneficiaries who are enrolled in TRS and at the same time are eligible for FEHB. The computer match between USPS Payroll and DEERS could have an adverse impact on those individuals who lose their entitlement for TRS benefits. However, the individuals will

be notified immediately of their ineligibility for TRS and will be informed about procedures for enrolling in FEHB. This matching process will help to insure the member has no break, or a limited break, in medical coverage.

The benefits to be derived from this matching operation are primarily non-quantifiable. DoD is responding to statute to exclude from the TRS program service members eligible for FEHB. No savings will accrue to DoD as a result of this match. Eligible beneficiaries will receive care they are entitled to under the law. By law, a cost benefit analysis must be prepared unless a waiver is sought. See paragraph XII for a ''Waiver of Cost Benefit Analysis'' statement.

F. Description of the Records

(1) Systems of Records (SOR). DoD will use the SOR identified as DMDC 02, entitled ''Defense Enrollment Eligibility Reporting System (DEERS)'' as amended by 74 Fed. Reg. 18356 (April 22, 2009). SSNs of DoD TRS Sponsors will be released to USPS pursuant to the routine use set forth in the system notice, which provides that data may be released to USPS ''for support of the DEERS enrollment process and to identify individuals not entitled to health care under TRS.'' (A copy of the system notice is given at Attachment 1).

Identification and FEHB status of DoD TRS sponsors will be provided by USPS to validate the eligibility statutory requirement of the TRS program. Therefore, eligibility information may also be maintained in the SOR identified as USPS 100.400, Personnel Compensation and Payroll Records—given at attachment 2.

(2) Number of Records. DMDC will submit an initial file containing the SSNs, Names, and DOB of TRS enrolled Selected Reservists for matching against the USPS Payroll database, and will submit subsequent finder files on a semi-annual basis thereafter. USPS will provide a reply file containing all appropriate matched and failed responses.

(3) Specified Data Elements. See Attachment 4 for a sample record format for the finder file and the reply file.

(4) Operational Time Factors. DMDC will forward the initial finder file of TRS sponsors to USPS after the Congressional and OMB review and public comment requirements, mandated by the Privacy Act, have been satisfied. USPS will provide a response file no later than 30 business days after receipt of the initial finder file. Subsequent finder files, submitted on a semi-annual basis, will receive a response within approximately 30 business days of receipt. USPS Payroll requires the reporting of the Health plan semi-annually; March and September. The file is usually available for use from 60 to 90 days after the end of the month.

G. Notice Procedures

TRICARE Management Activity (TMA) will inform all TRS sponsors of computer matching activities at the time of enrollment by means of the encounter statement on DD–Form 2896–1, also known as the TRS Request Form. This form is used to coordinate enrollment into the TRS program. TRS sponsors will certify at the time of enrollment they are not eligible for FEHB.

In order to provide direct notice, DMDC first needs the information from USPS to identify TRS participants who are FEHB eligible. Once DMDC receives that information, the TRS sponsors who are identified by USPS as FEHB eligible will be provided to each RC. The RC will verify the eligibility information and request the service member to terminate TRS coverage if the USPS information is correct or to seek Reserve component assistance to correct their FEHB eligibility information in USPS Payroll if USPS data is incorrect. TMA will also provide qualifying information for TRS to Selected Reserve members and TRS participants through beneficiary handbooks, pamphlets, educational materials, press releases, briefings, and via the TMA Web site.

Any deficiencies, as to direct notice to the individual for the matching program are solved by the indirect or constructive notice that is afforded the individual by agency publication in the **Federal Register** of both the (1) applicable routine use notice, as required by subsection (e) (11) of the Privacy Act, permitting the disclosure of FEHB eligibility information for DEERS TRS eligibility purposes, and (2) the proposed match notice, as required by subsection (e) (12) of the Privacy Act, announcing the agency's intent to conduct computer matching for verification of TRS for eligibility purposes.

H. Verification and Opportunity To Contest Findings

(1) Verification: The Reserve components, in support of OSD/RA, are responsible for resolving FEHB eligibility based on the data provided by DMDC from the USPS reply file, where inconsistencies exist.

(2) Any discrepancies as furnished by USPS, or developed as a result of the match, will be independently investigated and verified by the RCs, in support of OSD/RA, prior to any adverse action being taken against the individual.

(3) Opportunity to Contest Findings: Based on the OSD/RA policy the RCs agree to provide written notice to each individual whom DoD believes is no longer eligible for the TRS health benefits based on the USPS file match.

(4) If the individual fails to terminate coverage or notify the Reserve component that the information is not accurate within 30 days from the date of the notice, DoD will forward the information to the Reserve component TRS Program Manager for final resolution.

I. Retention and Disposition of Identifiable Records

USPS will retain all Personal identifiable records received from DMDC/DoD only for the period of time required for any processing related to the matching program. USPS will delete the DMDC/DoD file upon completion of the match.

The electronic data provided as part of the matching program will remain the property of the agency furnishing the files and will be destroyed after the matching program is completed, but not more than ninety (90) days after receipt of the electronic data, except for those records that must be retained in the individual's permanent case file in order to meet evidentiary requirements. In any such case, the agency will destroy the data once it is no longer needed. Destruction will be accomplished by shredding, burning or electronic erasure.

Neither USPS nor DMDC/DoD will create a separate permanent file or system that consists of information concerning only those individuals who are involved in the specific matching program except as necessary to monitor the results of the matching program. As soon as set-up processing for the next match has been completed and any duplicated hits identified, the information generated through the match will be destroyed unless the information must be retained to meet evidential requirements.

J. Security Procedures

(1) DoD and USPS will safeguard information provided under this agreement as follows: Each agency shall establish appropriate administrative, technical, and physical safeguards to assure the security and confidentiality of records and to protect against any anticipated threats or hazard to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is

maintained. All activities pursuant to this Agreement shall comply with all security procedures outlined in Handbook AS–805 of the Postal Service.

(2) Access to the records matched, and to any records created by the match, will be restricted only to those authorized employees and officials who need it to perform their official duties in connection with the uses of the information authorized in this agreement.

(3) The records matched, and any records created by the match, will be stored in an area that is physically safe from access by unauthorized persons during duty hours as well as non-duty hours or when not in use.

(4) The records matched, and any records created by the match, will be processed under the immediate supervision and control of authorized personnel, to protect the confidentiality of the records in such a way that unauthorized persons cannot retrieve any such records by means of computer, remote terminal or other means.

(5) All personnel who will have access to the records exchanged and to any records created by this exchange will be advised of the confidential nature of the information, the safeguards required to protect the information and the civil and criminal sanctions for noncompliance contained in applicable Federal Laws.

K. Records Usage, Duplication and Redisclosure Restrictions

(1) The matching files exchanged under this agreement remain the property of the providing agency and will be destroyed after match activity involving the files has been completed under this program as provided above in Section I.

(2) The data exchanged under this agreement will be used and accessed only for the purpose of determining eligibility for care under the TRS program.

(3) Neither DMDC nor USPS will extract information from the electronic data files concerning the individuals that are described therein for any purpose not stated in this agreement.

(4) Except as provided in this agreement, neither DMDC nor USPS will duplicate or disseminate the data produced without the disclosing agency's permission. Neither agency shall give such permission unless the re-disclosure is required by law or essential to the conduct of the matching program. In such cases, DMDC and USPS will specify in writing what records are being disclosed, and to whom, and the reasons that justify such re-disclosure.

L. Records Accuracy Assessments

DMDC estimates that at least 99% of the information in the finder file is accurate based on their operational experience. USPS estimates that at least 99% of the information on the reply file is accurate based on their operational experience.

M. Reimbursement/Funding

Expenses incurred by this data exchange will not involve any payments or reimbursements between USPS and DoD.

N. Approval and Duration of Agreement

(1) This matching agreement, as signed by representatives of both agencies and approved by the respective agency's Data Integrity Board (DIB) and shall be valid for a period of 18 months from the effective date of the agreement.

(2) When this agreement is approved and signed by the Chairpersons of both agencies Data Integrity Board's, the USPS, as the matching agency, will submit the agreement and the proposed public notice of the match as attachments in duplicate via a transmittal letter to OMB and Congress for review. The time period for review begins as of the date of the transmittal letter.

(3) USPS will forward the public notice of the proposed matching program for publication in the **Federal Register,** as required by subsection (e)(12) of the Privacy Act, the same time the transmittal letter is forwarded to OMB and Congress. The matching notice will clearly identify the record systems and category of records being used and state that the program is subject to review by OMB and Congress. A copy of the published notice shall be provided to the DoD.

(4) The effective date of the matching agreement and date when matching may actually begin shall be at the expiration of the 40-day review period for OMB and Congress, or 30 days after publication of the matching notice in the **Federal Register,** whichever is later. The parties to this agreement may assume OMB and Congressional concurrence if no comments are received within 40 days of the date of the transmittal letter. The 40-day OMB and Congressional review period and the mandatory 30-day public comment period for the **Federal Register** publication of the notice will run concurrently.

(5) This agreement will be in effect as long as the statutory requirement for the data match exists, subject to the Privacy Act, including certification by the both participating agencies to the responsible DoD DIB or USPS Information Security Group that:

(i) The matching program will be conducted without change, and

(ii) The matching program has been conducted in compliance with the original agreement.

(6) This agreement may be modified at any time by a written modification to this agreement that satisfies both parties and is approved by the DoD DIB and the USPS Information Security Group of each agency.

(7) This agreement may be terminated at any time with the consent of both parties. If either party does not want to continue this program, it should notify the other party of its intention not to continue at least 90 days before the end of the then current period of the agreement. Either party may unilaterally terminate this agreement upon written notice to the other party requesting termination, in which case the termination shall be effective 90 days after the date of the notice or at a later date specified in the notice provided the expiration date does not exceed the original or the extended completion date of the match.

O. Waiver of Cost Benefit Analysis

The purpose of this matching program is to verify the eligibility of TRS Selected Reserve sponsors enrolled in TRS. By statute, such coverage may only be provided if the person is not eligible for FEHB. It has been determined that FEHB eligible information for applicable Reservists can only be obtained from USPS. Without this information, a determination of continued eligibility cannot be made and matching must occur irrespective of the associated cost or anticipated benefits. Accordingly, the cost benefit analysis is waived.

P. Persons To Contact

The contacts on behalf of DoD are:

Mr. Samuel P. Jenkins, Director, Defense Privacy Office, 1901 S. Bell Street, Suite 920, Arlington, VA 22202, (703) 607–2943;

Mr. David M. Percich, Director for Reserve Systems Integration, Office of the Secretary of Defense for Reserve Affairs, 1500 Defense Pentagon, Washington DC 20301–1150, (703) 693–7490;

Ms. Janine Groth, Chief DEERS Division, Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Rd., Seaside, CA. 93955–6771, (831) 583–2400 x4173.

The contact on behalf of USPS is:

Mr. Alan Ruof, Manager Benefits Programs, Compensation, 475 L'Enfant Plaza, SW., Washington. DC

20260–4210, (202) 268–4187, (202) 268–3337 fax, e-mail: *malan.alan.ruof@usps.gov.*

Q. Approvals

Department of Defense Program Official

The authorized program officials, whose signatures appear below, accept and expressly agree to the terms and conditions expressed herein, confirm that no verbal agreements of any kind shall be binding or recognized, and hereby commit their respective organizations to the terms of this agreement.

Guy A. Stratton, Staff Director to Deputy Assistant Secretary of Defense for Reserve Affairs, Manpower and Personnel, Office of the Secretary of Defense for Reserve Affairs;

Mary Snavely-Dixon, Director, Defense Manpower Data Center.

Data Integrity Boards

The respective DIBs having reviewed this agreement and finding that it complies with applicable statutory and regulatory guidelines signify their respective approval thereof by the signature of the officials appearing below.

Mr. Michael L Rhodes, Acting Chairperson, Data Integrity Board, Department of Defense.

R. USPS Program Official

The authorized program officials, whose signatures appear below, accept and expressly agree to the terms and conditions expressed herein, confirm that no verbal agreements of any kind shall be binding or recognized, and hereby commit their respective organizations to the terms of this agreement.

USPS United States Postal Service Program Official

Rowena C. Dufford, Acting Chief Privacy Officer, Acting Secretary, Data Integrity Board, United States Postal Service.

Data Integrity Boards

The respective DIBs having reviewed this agreement and finding that it complies with applicable statutory and regulatory guidelines signify their respective approval thereof by the signature of the officials appearing below.

Delores J. Killette, Vice President and Consumer Advocate, Chairperson, Data Integrity Board, United States Postal Service.

[FR Doc. E9–28901 Filed 12–3–09; 8:45 am]

BILLING CODE 7710–12–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before February 2, 2010.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Radwan Saade, Economist, Office of Advocacy, Small Business Administration, 409 3rd Street, 6th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Radwan Saade, Economist, 202–205–6878, *radwan.saade@sba.gov;* Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: The Office of Advocacy is requested under Public Law 110–385, Sec. 105 to study the impact of broadband speed and price on small businesses. Columbia Telecommunications Corporation (CTC) has been tasked with the design, implementation, and analysis of the collection which will be used to guide recommendations for improvements related to small business access to broadband. This assessment will rely on survey data as well as existing industry, government and private resources.

Title: ''Impact of Broadband Speed and Prime on Small Business.''

Description of Respondents: Small Businesses using Broadband Internet services.

Form Number: N/A.

Annual Responses: 1,200.

Annual Burden: 250.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. E9–28997 Filed 12–3–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29064; 812–13712]

Strategic Funds, Inc., et al.; Notice of Application

November 30, 2009.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements.

Summary of Application: Applicants request an order that would permit them to enter into and materially amend subadvisory agreements without shareholder approval and would grant relief from certain disclosure requirements.

Applicants: Strategic Funds, Inc. (the ''Company'') and The Dreyfus Corporation (the ''Adviser'').

Filing Dates: The application was filed on November 2, 2009, and amended on November 24, 2009.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 22, 2009, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants: The Dreyfus Corporation, 200 Park Avenue, New York, NY 10166.

FOR FURTHER INFORMATION CONTACT: Steven I. Amchan, Senior Counsel, at (202) 551–6826, or Julia Kim Gilmer, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's

Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. Strategic Funds, Inc., a Maryland corporation, is registered under the Act as an open-end management investment company and currently offers five series employing one or more investment subadvisers (''Subadvisers''), each with separate investment objectives, policies and restrictions (each, a ''Fund'' and collectively, the ''Funds'').[1] The Adviser, the primary mutual fund business of The Bank of New York Mellon Corporation, is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). The Adviser serves as investment adviser to each Fund under an investment advisory agreement with the Company (''Advisory Agreement'') that has been approved by the shareholders of each Fund and by the board of directors of the Company (''Board''), including a majority of the directors who are not ''interested persons,'' as defined in section 2(a)(19) of the Act, of the Company or the Adviser (''Independent Board Members'').

2. Under the terms of the Advisory Agreement, the Adviser provides a Fund with investment management, research and supervision, and furnishes a program of investment, evaluation and, if appropriate, sale and reinvestment of such Fund's assets. For the investment management services that it provides to each Fund, the Adviser receives the fee specified in the Advisory Agreement from the Fund. The Advisory Agreement also permits the Adviser to enter into investment subadvisory agreements (''Subadvisory Agreements'') with one or more Subadvisers. Pursuant to its authority under the Advisory Agreement, the Adviser (having obtained appropriate Board and shareholder approval) has entered into Subadvisory Agreements with various Subadvisers to provide investment advisory services to certain Funds. Each Subadviser is, and every future Subadviser will be, registered as an investment adviser under the Advisers Act. The Adviser will evaluate, allocate assets to, and oversee the Subadvisers, and make recommendations about their hiring, termination and replacement to the Board, at all times subject to the authority of the Board.[2] Subadvisers recommended to the Board by the Adviser will be selected and approved by the Board, including a majority of the Independent Board Members. Each Subadviser will have discretionary authority to invest all or a portion of the assets of a particular Fund, subject to the general supervision of the Adviser and the Board. The Adviser will compensate each Subadviser out of the fees paid to the Adviser by the Fund.

3. Applicants request an order to permit the Adviser, subject to Board approval, to enter into and materially amend Subadvisory Agreements without obtaining shareholder approval. The requested relief will not extend to EACM or to any Subadviser who is an affiliated person, as defined in section 2(a)(3) of the Act, of the Company or the Adviser, other than by reason of serving as a Subadviser to one or more of the Funds (''Affiliated Subadviser'').

4. Applicants also request an exemption from the various disclosure provisions described below that may require the Funds to disclose fees paid by the Adviser to each Subadviser. An exemption is requested to permit a Fund to disclose (as both a dollar amount and as a percentage of the Fund's net assets): (a) The aggregate fees paid to the Adviser and any Affiliated Subadvisers; and (b) the aggregate fees paid to Subadvisers other than Affiliated Subadvisers (''Aggregate Fee Disclosure''). Any Fund that employs an Affiliated Subadviser will provide separate disclosure of any fees paid to the Affiliated Subadviser. Each Fund also will provide separate disclosure of any fees paid to EACM.

Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except pursuant to a written contract that has been approved by the vote of a majority of the company's outstanding voting securities. Rule 18f–2 under the Act provides that each series or class of stock in a series company affected by a matter must approve such matter if the Act requires shareholder approval.

2. Form N–1A is the registration statement used by open-end investment companies. Item 14(a)(3) of Form N–1A requires disclosure of the method and amount of the investment adviser's compensation.[3]

3. Item 22 of Schedule 14A under the Securities Exchange Act of 1934 (''1934 Act''), through the application of rule 20a–1 under the Act, sets forth the information that must be included in an investment company proxy statement. Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A, taken together, require a proxy statement for a shareholder meeting at which the advisory contract will be voted upon to include the ''rate of compensation of the investment adviser,'' the ''aggregate amount of the investment adviser's fees,'' a description of the ''terms of the contract to be acted upon,'' and, if a change in the advisory fee is proposed, the existing and proposed fees and the difference between the two fees.

4. Form N–SAR is the semi-annual report filed with the Commission by registered investment companies. Item 48 of Form N–SAR requires investment companies to disclose the rate schedule for fees paid to their investment advisers, including the Subadvisers.

5. Regulation S–X sets forth the requirements for financial statements required to be included as part of investment company registration statements and shareholder reports filed with the Commission. Sections 6–07(2)(a), (b), and (c) of Regulation S–X require that investment companies include in their financial statements information about investment advisory fees.

6. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provision of the Act, or from any rule thereunder, if and

[1] Applicants also request relief with respect to future Funds and any other existing or future registered open-end management investment company or series thereof that: (a) Is advised by the Adviser or a person controlling, controlled by, or under common control with the Adviser (included in the term ''Adviser''); (b) uses the manager of managers structure described in the application; and (c) complies with the terms and conditions of the application (included in the term ''Funds''). The only existing registered open-end management investment company that currently intends to rely on the requested order is named as an applicant. If the name of any Fund contains the name of a Subadviser, the name of the Adviser will precede the name of the Subadviser.

[2] The Adviser has entered into an agreement with its affiliate, EACM Advisors LLC (''EACM''), which is registered as an investment adviser under the Advisers Act, (the ''Consultant Agreement'') to assist the Adviser with the Dreyfus Select Managers Small Cap Value Fund. Pursuant to the Consultant Agreement, EACM assists the Adviser in evaluating and recommending Subadvisers, and recommending the portion of portfolio assets to be managed by each Subadviser, as well as monitoring and evaluating the performance of Subadvisers and recommending whether a Subadviser should be terminated. EACM may provide similar services for other Funds. However, it is the Adviser's responsibility to select, subject to the review and approval of the Board, Subadvisers to manage all or part of a Fund's assets and review their performance.

[3] Form N–1A was recently amended by the Commission, effective March 31, 2009, and Item 14(a)(3) should be read to refer to Item 19(a)(3) for each Fund when that Fund begins using the revised form.

to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants believe that their requested relief meets this standard.

7. Applicants state that the shareholders expect the Adviser and the Board to select the Subadviser for a Fund that is best suited to achieve the Fund's investment objective. Applicants assert that, from the perspective of the investor, the role of the Subadvisers is substantially equivalent to the role of the individual portfolio managers employed by traditional investment company advisory firms. Applicants believe that permitting the Adviser to perform those duties for which shareholders of the Funds are paying the Adviser without incurring unnecessary delay or expense would be appropriate in the interests of Fund shareholders and would allow the Funds to operate more efficiently. Applicants note that the Advisory Agreement, the Consultant Agreement and any Affiliated Subadviser's Subadvisory Agreement would remain fully subject to the requirements of section 15(a) of the Act and rule 18f–2 under the Act, including the requirement for shareholder voting.

8. Applicants assert that many Subadvisers use a ''posted'' rate schedule to set their fees. Applicants state that while Subadvisers are willing to negotiate fees that are lower than those posted on the schedule, they are reluctant to do so where the fees are disclosed to other prospective and existing customers. Applicants submit that the requested relief will allow the Adviser to negotiate more effectively with each Subadviser.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Fund may rely on the order requested in the application, the operation of the Fund in the manner described in the application will be approved by a majority of the Fund's outstanding voting securities, as defined in the Act, or, in the case of a Fund whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the sole initial shareholder before offering the Fund's shares to the public.

2. The prospectus for each Fund will disclose the existence, substance, and effect of any order granted pursuant to the application. Each Fund will hold itself out to the public as employing the manager of managers structure described in the application. The prospectus will prominently disclose that the Adviser has ultimate responsibility (subject to oversight by the Board) to oversee the Subadvisers and recommend their hiring, termination, and replacement.

3. Within 90 days of the hiring of a new Subadviser, the affected Fund shareholders will be furnished all information about the new Subadviser that would be included in a proxy statement, except as modified to permit Aggregate Fee Disclosure. This information will include Aggregate Fee Disclosure and any change in such disclosure caused by the addition of the new Subadviser. To meet this obligation, the Fund will provide shareholders within 90 days of the hiring of a new Subadviser with an information statement meeting the requirements of Regulation 14C, Schedule 14C, and Item 22 of Schedule 14A under the 1934 Act, except as modified by the order to permit Aggregate Fee Disclosure.

4. The Adviser will not enter into a Subadvisory Agreement with any Affiliated Subadviser without that agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Fund.

5. At all times, at least a majority of the Board will be Independent Board Members, and the nomination of new or additional Independent Board Members will be placed within the discretion of the then existing Independent Board Members.

6. When a Subadviser change is proposed for a Fund with an Affiliated Subadviser, the Board, including a majority of the Independent Board Members, will make a separate finding, reflected in the applicable Board minutes, that such change is in the best interests of the Fund and its shareholders and does not involve a conflict of interest from which the Adviser or the Affiliated Subadviser derives an inappropriate advantage.

7. Independent legal counsel, as defined in rule 0–1(a)(6) under the Act, will be engaged to represent the Independent Board Members. The selection of such counsel will be within the discretion of the then existing Independent Board Members.

8. The Adviser will provide the Board, no less frequently than quarterly, with information about the profitability of the Adviser on a per-Fund basis. The information will reflect the impact on profitability of the hiring or termination of any Subadviser during the applicable quarter.

9. Whenever a Subadviser is hired or terminated, the Adviser will provide the Board with information showing the expected impact on the profitability of the Adviser.

10. The Adviser will provide general management services to each Fund, including overall supervisory responsibility for the general management and investment of the Fund's assets and, subject to review and approval of the Board, will (a) set each Fund's overall investment strategies; (b) evaluate, select and recommend Subadvisers to manage all or a part of a Fund's assets; (c) when appropriate, allocate and reallocate a Fund's assets among multiple Subadvisers; (d) monitor and evaluate the performance of Subadvisers; and (e) implement procedures reasonably designed to ensure that the Subadvisers comply with each Fund's investment objective, policies and restrictions.

11. No director or officer of the Company, or director or officer of the Adviser, will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person) any interest in a Subadviser, except for (a) ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser; or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly traded company that is either a Subadviser or an entity that controls, is controlled by or is under common control with a Subadviser.

12. Each Fund will disclose in its registration statement the Aggregate Fee Disclosure.

13. In the event the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the application, the requested order will expire on the effective date of that rule.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–28977 Filed 12–3–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61068; File No. SR–CBOE–2009–089]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Related to Stock-Option Orders

November 27, 2009.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 18, 2009, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its complex order RFR auction (''COA'') as it applies to stock-option orders. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Office of the Secretary, CBOE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Prior to routing to the complex order book (''COB'') or once on PAR, eligible complex orders may be subjected to an automated COA process where orders are exposed for price improvement. Currently, if a market order cannot be filled in whole or in a permissible ratio at the conclusion of COA, then the order (or any remaining balance) will route to PAR for manual handling.

The Exchange is proposing to revise the operation of COA as it relates to market stock-option orders that contain one or more option leg(s). The Exchange is proposing to revise the COA process so that, instead of routing to PAR for manual handling, the Exchange may determine on a class-by-class basis that any remaining balance of the option leg(s) will automatically route to CBOE's Hybrid System for processing as a simple market order(s) consistent with CBOE's order execution rules and any remaining balance of the stock leg will automatically route to the CBOE Stock Exchange (''CBSX''), CBOE's stock facility, for processing as a simple market order consistent with CBSX order execution rules.[4] This change will assist in the automatic execution and processing of stock-option orders that are market orders.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act[5] in general and furthers the objectives of Section 6(b)(5) of the Act[6] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The proposed rule change will assist in the automatic execution and processing of stock-option orders that are market orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2009–089 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2009–089. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090. Copies of the filing will

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Pursuant to Rule 6.53C.01, any determination by the Exchange to route complex market orders in this manner will be announced to the membership via Regulatory Circular.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

also be available for inspection and copying at the Exchange's principal office. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2009–089 and should be submitted on or before December 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–28891 Filed 12–3–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61067; File No. SR–NYSE–2009–89]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change as Modified by Amendment No. 1 To Amend Certain Corporate Governance Requirements

November 25, 2009.

I. Introduction

On August 26, 2009, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend certain of the Exchange's corporate governance requirements for listed companies. NYSE filed Amendment No. 1 to the proposed rule change on September 10, 2009. The proposal was published for comment in the **Federal Register** on September 17, 2009.[3] The Commission received two comment letters on the proposal.[4] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend Section 303A of its Listed Company Manual (''Manual''), which comprises the Exchange's corporate governance standards for listed companies, and to eliminate current Section 307.00, regarding related party transactions.[5] The changes, which would take effect on January 1, 2010, include the following:

A. Corporate Governance Disclosures

1. Disclosures Required by Regulation S–K Under the Act

Section 303A of the Manual currently requires a listed company to disclose the identity of its independent directors, the basis upon which its board may determine that a director is independent, and—if it is a controlled company—any exemptions from the independence requirements upon which it has relied. Disclosures relating to the same aspects of a company's corporate governance are now required by Item 407 of the Commission's Regulation S–K.[6] The proposal would eliminate each of the Exchange's requirements that is similar to a requirement of Item 407, and incorporate directly into Section 303A the applicable requirement of Item 407.[7]

2. Disclosures Regarding Required Web site Postings

A listed company is required by the NYSE standards to post the charters of its audit, compensation, and nominating/corporate governance committees, its corporate governance guidelines, and its code of business conduct and ethics on the company's Web site, and to state in its proxy statement or annual report that these documents are so posted. The proposal would add that the listed company's Web site address must be included,[8] but would delete the current requirement for the company to state that the documents are available in print to any shareholder who requests them.

3. Other Required Disclosures

Section 303A currently also requires various other disclosures to be made in the company's proxy statement or annual report.[9] The Exchange proposes to allow a company alternatively to make these disclosures on its website.[10] If a company chooses to do so, it would be required to disclose this in its proxy statement or annual report and provide the website address.

Section 303A.11 of the Manual currently requires a foreign private issuer to disclose any significant ways in which its corporate governance practices differ from those required of domestic companies under NYSE listing standards. Under the proposal, a foreign private issuer that is required to file an annual report on Form 20–F with the Commission would be required to include the statement of significant differences in that annual report.

The proposal also would eliminate the requirement in Section 303A.12(a) that a listed company disclose in its annual report (or on Form 10–K if the company does not prepare an annual report to shareholders) that its chief executive officer (''CEO'') filed the certification regarding corporate governance required by the Exchange, and that the company complied with Commission certification requirements regarding public disclosure. The Exchange proposes to revise Section 303A.12(b) to provide that the CEO of a listed company must notify the Exchange in writing after any executive officer of the company becomes aware of any non-compliance with Section 303A, as opposed to requiring notification in the event of material non-compliance as provided by the current rule.

B. Transition Periods for Newly-Listed Companies

By way of background, NYSE's rules incorporate by reference Rule 10A–3 under the Act,[11] which requires a listed

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60653 (September 11, 2009), 74 FR 47831 (September 17, 2009), 74 FR 48615 (September 23, 2009) (''Notice'').

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, dated October 8, 2009, and from Davis Polk & Wardwell LLP, dated October 9, 2009 (''Davis Polk Letter'').

[5] The Exchange states that current Section 307 is duplicative of Section 314. Under the proposal, current Section 303A.14 would be re-designated as Section 307.

[6] 17 CFR 229.407.

[7] Section 303A also revises the requirements relating to reports by a company's audit and compensation committees that are required by the Commission and are to be included in the company's annual proxy statement or annual report. The proposed rule change would amend these requirements to reference the disclosures required by Item 407.

[8] The proposal also would reorganize the website posting requirements in the rule text. Further, Section 303A.07 would state expressly that closed-end funds are not subject to the requirement to post their audit committee charters, consistent with current practice.

[9] These disclosures concern contributions by the listed company to tax exempt organizations; executive sessions of non-management or independent directors; communication with the presiding director or the non-management or independent directors; and simultaneous service of an audit committee member on the audit committees of more than three public companies.

[10] The proposed rule change would further provide that, if a listed company makes a required Section 303A disclosure in its proxy statement or annual report filed with the Commission, it may incorporate such disclosure by reference from another document that is filed with the Commission to the extent permitted by applicable Commission rules.

[11] 17 CFR 240.10A–3.

company to have an audit committee composed solely of independent directors. Rule 10A–3 permits a company listing in conjunction with an initial public offering (''IPO'') to phase in compliance with this requirement. Under Rule 10A–3, all but one member of the audit committee may be exempt from the independence requirements of the rule for ninety days from the date of effectiveness of the issuer's registration statement under Section 12 of the Act or the issuer's registration statement under the Securities Act of 1933 covering the issuer's initial public offering (''IPO'') of securities to be listed by the issuer, and a minority of the members of the committee may be exempt from the independence requirements of Rule 10A–3 for one year.[12]

The Exchange's rules require that the nominating and compensation committees of a listed company also be composed solely of independent directors. However, companies listing in conjunction with an IPO are permitted a transition period for these committees to be composed solely of independent directors that is similar to that permitted by Rule 10A–3 for audit committees: at least one independent director member at the time of listing, a majority of independent director members within ninety days of listing, and a fully independent committee within one year.[13] The proposal would adjust this transition schedule to allow the first independent director member to be appointed by the earlier of the date that the IPO closes or five business days from the listing date, rather than on the listing date.[14]

The proposed rule change would allow a similar phase-in period for a company listing in conjunction with a spin-off or a carve-out transaction. In such transactions, there would need to be one independent director member on both the nominating and compensation committees by the date the transaction closes, at least a majority of independent director members on each committee within ninety days of the listing date, and fully independent committees within one year of the listing date. A company listing upon emergence from bankruptcy, for which the NYSE rules already provide a similar phase-in period, would continue to be required to have one independent director by the date of listing, as under the current rule. The same phase-in would be specified for a company that ceases to qualify as a controlled company and thereby loses its exemption from the independence requirements for these committees, but the first independent director member would be required to be in place for the nominating and compensation committees by the date the company's status changes.

The NYSE also proposes to allow a company listing in conjunction with an IPO or a spin-off or carve-out transaction a phase-in period with respect to the provision in Section 303A.07(a) which requires a company to have a minimum of three members on its audit committee. Such companies would be required to have at least one member on their audit committees by the listing date, at least two members within ninety days of the listing date, and at least three members within one year of the listing date.[15] This phase-in of the minimum size requirement would not be available to a company emerging from bankruptcy or a company ceasing to qualify as a controlled company. Such companies would still be required to have a minimum of three members on their audit committees from the date of listing on the NYSE or the date of the status change, as applicable.

NYSE proposes new rules for companies previously registered pursuant to Section 12(g) of the Act [16] that list on the Exchange. Such companies would be required to have a majority independent board within one year of the listing date. Their nominating and compensation committees would be required to have at least one independent member by the listing date, a majority of independent members within ninety days, and fully independent members within a year of the listing date. Only independent directors would be permitted on the audit committee during the transition period (unless an exemption is available under Rule 10A–3), but a phase-in would be permitted with respect to the committee size requirement: at least one independent director member as of the date of listing, two independent director members within ninety days of the listing date, and three independent director members within one year of the listing date.

A foreign private issuer is permitted to follow its home country practice in lieu of certain NYSE corporate governance standards for domestic listed companies. The proposed rule change would set forth a transition period for a foreign issuer that determines that it no longer qualifies as a foreign private issuer. The provision references Rule 3b–4 under the Act,[17] which enables a foreign private issuer to test its status once a year on the last business day of its second fiscal quarter (''Determination Date''), and requires a foreign private issuer to comply with the reporting requirements and use the forms prescribed for domestic companies beginning on the first day of the fiscal year following the Determination Date.

In addition, under Section 303A.08 of the NYSE standards, which concerns shareholder approval of equity compensation plans, a company that ceases to be a foreign private issuer would be granted a limited transition period with respect to discretionary plans and formula plans that were in place prior to the date that its status changed. A shareholder-approved formula plan could continue to be used after the end of the transition period if it is amended to provide for a term of ten years or less from the later of the date of its original adoption or its most recent shareholder approval. A formula plan could be used without shareholder approval if the grants after the date of the status change are made only from the shares available immediately before the Determination Date.

Finally, pursuant to language proposed in various sections of the Introduction to Section 303A.00, the proposal would permit the various types of newly-listed companies to comply with requirements for listed companies to post certain documents on their websites (discussed above) by the same date they are required, respectively, to have at least one independent director member on their nominating and compensation committees.

C. Other Proposed Revisions

The following section describes several of the other, more substantive changes included in the proposal:

[12] 17 CFR 240.10A–3(b)(1)(iv)(A).

[13] The proposed rule change would define the ''listing date'' for purposes of the phase-in periods in this section generally as the date the company's securities first trade on the Exchange.

[14] The ninety-day and one-year periods for the phase-in of the NYSE independence requirements for these two committees—as well as the one-year deadline for a company to satisfy the Exchange's requirement that a listed company have a majority of independent directors on its board—would begin from the date of listing.

[15] As noted above, all the members of the audit committee must be independent as of the listing date unless a phase-in is permitted pursuant to Rule 10A–3. Thus, although NYSE rules would permit a phase-in of the *number* of members on the audit committee, all those members would still need to be independent (unless the company is allowed a phase-in of the Rule 10A–3 independence requirements). For example, a company listing in conjunction with a spin-off might have only two members on the audit committee on the date the transaction closes (and could have as few as one). However, both those members would still be required to be independent (assuming the company is ineligible for a phase-in of the Rule 10A–3 independence requirements).

[16] 15 U.S.C. 78l(g).

[17] 17 CFR 240.3b–4.

The Introduction to Section 303A would include Section 303A.08, ''Shareholder Approval of Equity Compensation Plans'' in the list of sections with which closed end funds must comply.[18] Securities listed under Section 703.22 of the Manual (''Equity Index-Linked Securities, Commodity-Linked Securities and Currency-Linked Securities'') would be included among the securities to which Section 303A does not apply (except as otherwise provided by Rule 10A–3 under the Act).

Controlled companies, which are exempt from certain requirements, currently are defined as companies of which more than 50% of the voting power is held by an individual, a group, or another company. The definition would be revised to make clear that the 50% criterion relates specifically to voting power for the election of directors. The proposal also would clarify that references to a ''listed company'' or ''company'' in the provisions relating to director independence include, in addition to any parent or subsidiary in a consolidated group with the listed company, any such other company as is relevant to any determination under the applicable independence standards of Section 303A.02(b).

The proposal would allow companies to hold regular executive sessions of independent directors as an alternative to the sessions of non-management directors currently required. A company would be required to enable all interested parties, not only shareholders, to communicate concerns regarding the company to these non-management or independent directors.

The Exchange proposes to add language to rule commentary in Section 303A.07 regarding audit committees to make clear that, if a closed-end fund chooses to voluntarily include a ''Management's Discussion of Fund Performance'' in its Form N–CSR, its audit committee is required to meet to review and discuss it. The Exchange also proposes to clarify that telephonic conference calls constitute meetings if allowed by applicable corporate law.

Section 303A.10, requiring a listed company to disclose to shareholders any waiver from its code of business conduct and ethics that is granted to an executive officer or director, would be amended to specify that the disclosure must be made within four business days of the determination by the company to grant the waiver, through a press release, Web site disclosure, or the filing of a current report on Form 8–K with the Commission.

Finally, the Exchange proposes to amend provision (c) of Section 303A.12 (Certification Requirements) to require each listed company to submit an interim Written Affirmation ''as and when required by the interim Written Affirmation form specified by the NYSE,'' as opposed to ''each time a change occurs to the board or any of the committees subject to Section 303A.''

III. Discussion and Commission Findings

After careful consideration of the proposed rule change and the comments received, the Commission finds that the proposal is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with Section 6(b)(5) of the Act[19] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; and in general, to protect investors and the public interest. The Commission further believes that the proposal is consistent with Rule 10A–3 under the Act[20] concerning audit committee requirements for listed issuers.

Corporate Governance Disclosures

The Commission believes that it is reasonable for NYSE to revise its disclosure provisions in its corporate governance listing standards set forth in Section 303A of the Manual to align with the disclosure requirements of Item 407 of Regulation S–K, and to incorporate such standards by reference in those listing standards so as to reduce burdens on listed companies. The Commission notes that, as the Exchange has stated, companies that are deficient in their fulfillment of Item 407 disclosure requirements will be deemed to be out of compliance with the Exchange's rules. Consequently, the Exchange will be able to take actions against a noncompliant company, ranging from appending a below compliance (''BC'') indicator to the company's ticker symbol, issuing a public reprimand letter, and, in appropriate cases, delisting.

In the Commission's view, the proposal improves upon the current rules by stating clearly that a listed company must provide its Web site address when it discloses in its proxy statement or annual report, as required, that its key committee charters, code of ethics, and corporate governance guidelines are posted on its Web site. The Commission believes that it is reasonable for the Exchange to allow a company to fulfill its disclosure obligations with respect to these documents by posting them on its Web site, without having to provide them in print form. Certain of the disclosures required by the Commission's own rules are permitted to be made on a company's Web site as long as the company's proxy statement makes reference to the information and provides a Web site address.[21]

As discussed above, the proposal also would allow a company to make certain other Exchange-required disclosures on its Web site instead of in its proxy statement or annual report, provided that the company states in the proxy statement or annual report that it has done so and provides the Web site address. The Commission believes that it is reasonable for the Exchange to provide companies with this alternative approach with respect to the specified disclosures. Similarly, the Commission believes that the amendments to the Exchange's listing rules governing disclosure by a foreign private issuer are appropriate.

Transition Periods for Newly-Listed Companies

The Commission believes that the proposed amendments relating to the phase-in period for specified companies newly listing on the Exchange (or newly becoming subject to certain corporate governance listing standards as a result of change in status) are reasonable. The proposed rules would permit a phase-in schedule similar to that allowed under the current rules for a company listing in conjunction with an IPO, and would extend such a phase-in schedule appropriately to companies listing in conjunction with spin-off and carve-out transactions, while offering an acceptable minimal tolerance for the special circumstances of each of these types of new listings with respect to the point in time that the standards would begin to apply. The Commission notes that the Exchange's proposal does not make adjustments for compliance with any requirements of Rule 10A–3 under the Act.

The Commission notes that a company listing upon emerging from

[18] The Exchange states that the omission of this section in the current rule was an oversight.

[19] 15 U.S.C. 78f(b)(5). In approving the proposal, the Commission has considered the proposed rules' impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[20] 17 CFR 240.10A–3.

[21] *See, e.g.,* Instruction 2 to Item 407 of Regulation S–K. *See also* Securities Act Release No. 8732A; Securities Exchange Act Release No. 54302A; Investment Company Act Release No. 27444A (August 29, 2006), 71 FR 53158 (September 8, 2006).

bankruptcy will still be required to have at least one independent director member on its nominating and compensation committees from the first day of listing (*i.e.,* the day the security first trades on NYSE). A company that has relied on the exemptions available for controlled companies will be required to meet this standard as of the date its status changes.

The proposed rule change also would allow a company listing in conjunction with an IPO, a spin-off, or a carve-out a phase-in period with respect to the NYSE requirement that the audit committee of a listed company have at least three members. In the Commission's view, permitting a company to have only one member on its audit committee by the listing date, at least two members within ninety days of the listing date, and three members within a year of the listing date, affords a reasonable accommodation for such companies. The Commission notes that a company emerging from bankruptcy will continue to be required to have at least three members on its audit committee from the day its securities begin to trade on the Exchange.

The Commission further notes that the proposed rule change does not grant an exemption or phase-in period to any newly-listed company with respect to the provision set forth in Section 303A.07 of the Manual that requires every listed company's audit committee—without distinction as to the committee's size—to have at least one member who has accounting or related financial management expertise. In addition, Rule 10A–3 under the Act requires at least one member of a listed company's audit committee to be independent as of the listing date, even when the company is allowed a phase-in period with respect to the independence of other audit committee members.[22] Thus, if a newly-listed company that is eligible for a phase-in period with respect to the size requirement chooses to have initially only one member on its audit committee, that member would need to be independent and also to meet the NYSE financial expertise requirement.

With respect to NYSE's Section 303A.08 governing shareholder approval of equity compensation plans, the Commission believes that it is reasonable for NYSE to incorporate the determination date in Rule 3b-4 under the Act[23] for a transition period for a company that ceases to be a foreign private issuer and to provide its issuers guidance on the continued use of formula plans, both with and without shareholder approval, after its status changes from a foreign private issuer.

Other Proposed Revisions

The Commission understands that the Exchange proposes to clarify in the Introduction to Section 303A.00 that closed-end funds are subject to Section 303A.08. The fact that this provision does not currently appear to require closed-end funds to comply with Section 303A.08 apparently results from an oversight on the part of the Exchange. The inclusion of securities governed by Section 703.22 of the Manual (Equity Index-Linked Securities, Commodity-Linked Securities and Currency-Linked Securities) among the list of preferred and debt securities to which the NYSE governance standards do not apply is an appropriate update of the rules and is consistent with NYSE's treatment of similar securities.[24] The proposed amendment to the definition of a controlled company is a revision that has previously been filed with the Commission by another exchange as a ''non-controversial'' proposed rule change.[25]

The Commission agrees with the Exchange that allowing companies to hold executive sessions of independent directors rather than of non-management directors is consistent with the intention of the current rule. The proposal to require that all interested parties, not only shareholders, be able to communicate concerns regarding a listed company to the director(s) also is appropriate. The Commission further believes that it is appropriate to provide that if a closed-end fund voluntarily includes a Management's Discussion of Fund Performance in its Form N–CSR, its audit committee should be required to meet and review it.

Currently, Section 303A.10 of the Manual provides that waivers of a company's code of business ethics and conduct must be ''promptly disclosed to shareholders'' and does not specify how such disclosure should be made. The proposed rule change sets a timeframe that is consistent with the requirements set by the Commission in Item 5.05 of Form 8–K[26] regarding such waivers, and improves the listing standard by setting forth specific alternatives by which the disclosures may be made.

The proposal would remove the provision in Section 303A.12(a) that requires a company to disclose in its annual report to shareholders (or, if the company does not prepare an annual report, in its annual Form 10–K) the specified certifications regarding any non-compliance filed with the NYSE and the Commission. The Exchange states that that this provision has caused confusion because it relates to certifications made in the prior year. Further, the Commission now requires a company to provide certifications by its principal executive officer and principal financial officer as an exhibit to the company's Form 10–Q and 10–K, and the Commission's disclosure requirements now include detailed provisions relating to a company's obligation to file a Form 8–K in instances where the company notifies the Exchange or the Exchange notifies the company of non-compliance with Exchange listing standards. In addition, the NYSE appends a BC indicator to the ticker symbol of an issuer that is non-compliant with the Exchange's corporate governance standards. In view of these changes, the Commission agrees that it is reasonable to delete the certification disclosure requirement of Section 303A.12(a). The Commission also believes that it is reasonable to allow NYSE to modify Section 303A.12(c) to require companies to submit a Written Affirmation as and when required by the Exchange's interim Written Affirmation form, as opposed to each time a change occurs to the board or any of the committees subject to Section 303A.

The two comment letters on the proposed rule change generally support its revisions, but oppose the amendment to require the CEO of a company to notify the NYSE after any executive officer becomes aware of ''any'' non-compliance with Section 303A, rather than ''any material'' non-compliance.[27] The commenters believe that public companies should not be burdened with a duty to report minor or inadvertent breaches, and that investors could overlook material instances of non-compliance among the many inconsequential matters that would need to be reported under the proposal. One commenter was concerned that, upon notification of such matters, ''the NYSE may be compelled to include the company on the list of noncompliant companies (after the proper notice period) and to disseminate a BC indicator for that company over the

[22] *See* 17 CFR 240.10A–3(b)(1)(iv).

[23] 17 CFR 240.3b-4.

[24] *See, e.g.,* Introduction to Section 303A.00 of the Manual, excepting Equity-Linked Debt Securities, Trust Issued Receipts, and Other Securities listed pursuant to Section 703.19 of the Manual, from certain corporate governance standards.

[25] *See* Securities Exchange Act Release No. 59424 (Feb. 19, 2009), 74 FR 8831 (Feb. 26, 2009) (SR–NASDAQ–2009–009).

[26] 17 CFR 249.308.

[27] *See supra,* note 5.

consolidated tape.'' [28] This commenter states: ''Because the noncompliant company list and BC indicator give no further detail about the company's infraction or degree of noncompliance, investors may assume that a company is in danger of being delisted when only a relatively minor infraction exists.'' [29]

The Commission believes that it is not unreasonable for the NYSE to require a company that is listed on its facility to notify the Exchange when it becomes aware that it is out of compliance with the Exchange's listing standards. With respect to the concern that the BC indicator provides no details about the reasons why the BC indicator was appended to the company's stock symbol, the NYSE's Web site provides the reason why a company has been placed on the non-compliant list.[30]

Finally, the Commission believes that the technical and other minor changes in the proposal improve and add to the clarity of the Exchange's corporate governance listing rules.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[31] that the proposed rule change (SR–NYSE–2009–89), as amended, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–28890 Filed 12–3–09; 8:45 am]

BILLING CODE 8011–01–P

[28] *See* Davis Polk Letter.

[29] *Id.*

[30] *See http://www.nyse.com/regulation/nyse/bcindex.html.* The Web site lists companies that are non-compliant with the Exchange's corporate governance listing standards separately from those non-compliant with other standards, and states: ''A noncompliant issuer is added to the list seven business days after the NYSE notifies the issuer of the deficiency; if the noncompliance results from a death or illness of a director, the issuer is added to the list six months after the event. An issuer is removed from the list one business day after the NYSE determines that the issuer is in compliance with NYSE corporate governance listing standards.'' The reason why a company is on the list can be seen via a link entitled, ''View more information on issuers noncompliant with NYSE corporate governance standards.''

[31] 15 U.S.C. 78s(b)(2).

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61008; File No. SR–NASDAQ–2009–094]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Require That Companies Provide Nasdaq With at least Ten Minutes Prior Notification When Releasing Material Information and Eliminate a Potential Inconsistency With Commission Guidance on the Use of Company Websites To Satisfy Public Disclosure Requirements

Correction

In notice document E9–27998 beginning on page 61186 in the issue of Monday, November 23, 2009, make the following correction:

On page 61186, in the second column, the docket number is corrected to read as set forth above.

[FR Doc. Z9–27998 Filed 12–03–09; 8:45 am]

BILLING CODE 1505–01–D

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS394]

WTO Dispute Settlement Proceeding Regarding China—Measures Related to the Exportation of Various Raw Materials

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is providing notice that on November 4, 2009, in accordance with the Marrakesh Agreement Establishing the World Trade Organization (''WTO Agreement''), the United States requested that the WTO Dispute Settlement Body establish a dispute settlement panel to review the U.S. claims concerning restraints on the export from China of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (the ''materials''). That request may be found at *http://www.wto.org* contained in a document designated as WT/DS394/7. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before January 19, 2010 to be assured of timely consideration by USTR.

ADDRESSES: Public comments should be submitted electronically to *http://www.regulations.gov,* docket number USTR–2009–0016. If you are unable to provide submissions by *http://www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission. If (as explained below), the comment contains confidential information, then the comment should be submitted by fax only to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: Shubha Sastry, Assistant General Counsel, or Katherine Tai, Associate General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395–6139 or (202) 395–9589.

SUPPLEMENTARY INFORMATION: Pursuant to Section 127(b) of the Uruguay Round Agreements Act (''URAA'') (19 U.S.C. 3537(b)(1)), USTR is providing notice that the United States has requested the WTO Dispute Settlement Body to establish a dispute settlement panel pursuant to the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (''DSU''). Such panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within approximately nine months after it is established.

Major Issues Raised by the United States

China imposes restraints on the export from China of various forms of bauxite (''bauxite'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes, as listed in Attachment 1 of Notice ''2009 Export Licensing Management Commodities List'' (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009) (''2009 Export Licensing List'') and/or the following eight-digit HS numbers as listed in Table 7 of Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009) (''2009 Export Duty List''): 2508300000/25083000, 2606000000/26060000, 26204000), coke (''coke'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List:

2704001000/27040010), fluorspar (''fluorspar'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2529210000/25292100, 2529220000/25292200), magnesium (''magnesium'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 81041100, 81041900, 81042000), manganese (''manganese'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 26020000, 8111001010/81110010, 8111001090/81110010), silicon carbide (''silicon carbide'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2849200000, 3824909910), silicon metal (''silicon metal'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 28046900), yellow phosphorus (''yellow phosphorus'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 28047010), and zinc (''zinc'' includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2608000001/26080000, 2608000090/26080000, 790111111000/790111100, 7901119000/79011190, 7901120000/79011200, 7901200000/79012000, 79020000, 26201100, 26201900).

These restraints include: quantitative restrictions in the form of quotas on the export of bauxite, coke, fluorspar, silicon carbide, and zinc; and export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc. Additional restraints in connection with the export of the materials include, but are not limited to: restrictions on the right of Chinese enterprises as well as foreign enterprises and individuals to export; requirements that foreign-invested enterprises must satisfy in order to export; non-automatic export licensing; excessive fees and formalities in connection with exportation; requiring that prices for the materials meet or exceed a minimum price before they may be exported. China administers certain of these export restraints through its ministries and other organizations under the State Council, as well as chambers of commerce and industry associations, in a manner that is not uniform, impartial, and reasonable. China also does not publish certain measures pertaining to requirements, restrictions, or prohibitions on exports.

USTR believes that these export restraints are inconsistent with China's obligations under Article VIII:1(a) and VIII:4, Article X:1 and X:3(a), and Article XI of the *General Agreement on Tariffs and Trade 1994;* paragraphs 2(A)2, 5.1, 5.2, 8.2, and 11.3 of Part I of the *Protocol on the Accession of the People's Republic of China* (''Accession Protocol''); and the provisions of paragraph 1.2 of Part I of the Accession Protocol (which incorporates commitments in paragraphs 83, 84, 162, and 165 of the *Report of the Working Party on the Accession of China*).

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit public comments electronically to *http://www.regulations.gov* docket number USTR–2009–0016. If you are unable to provide submissions by *http://www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

To submit comments via *http://www.regulations.gov,* enter docket number USTR–2009–0016 on the home page and click ''search''. The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Submit a Comment.'' (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the website by clicking on ''How to Use This Site'' on the left side of the home page.)

The *http://www.regulations.gov* site provides the option of providing comments by filling in a ''General Comments'' field, or by attaching a document. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''General Comments'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *http://www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

1. Must clearly so designate the information or advice;

2. Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' at the top and bottom of the cover page and each succeeding page; and

3. Must provide a non-confidential summary of the information or advice.

Any comment containing confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *http://www.regulations.gov* or by fax. The non-confidential summary will be placed in the docket and open to public inspection.

USTR will maintain a docket on this dispute settlement proceeding, accessible to the public. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, any non-confidential submissions, or non-confidential summaries of submissions, received from other participants in the dispute; the report of the panel; and, if

applicable, the report of the Appellate Body.

Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15 or information determined by USTR to be confidential in accordance with 19 U.S.C. 2155(g)(2). Comments open to public inspection may be viewed on the *http://www.regulations.gov* Web site.

Daniel Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. E9–28903 Filed 12–3–09; 8:45 am]

BILLING CODE 3190–W0–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS384 and WTO/DS386]

WTO Dispute Settlement Proceeding Regarding United States—Certain Country of Origin Labeling (COOL) Requirements

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is providing notice that on November 19, 2009, the World Trade Organization Dispute Settlement Body established a dispute settlement panel at the request of Canada and Mexico under the *Marrakesh Agreement Establishing the World Trade Organization* (''WTO Agreement'') concerning certain mandatory country of origin labeling (COOL) requirements. Those requests may be found at *http://www.wto.org* contained in documents designated as WT/DS384/8 for Canada and WT/DS386/7 for Mexico. USTR invites written comments from the public concerning the issues raised in these disputes.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before January 8, 2010, to be assured of timely consideration by USTR.

ADDRESSES: Comments should be submitted electronically to www.regulations.gov, docket number USTR–2009–0004. If you are unable to provide submissions by *http://www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission. If (as explained below), the comment contains confidential information, then the comment should be submitted by fax only to Sandy McKinzy at (202) 395–3640.

FOR FURTHER INFORMATION CONTACT: Probir J. Mehta, Associate General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395–3150.

SUPPLEMENTARY INFORMATION: USTR is providing notice that a dispute settlement panel has been established pursuant to the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (''DSU''). If a dispute settlement panel is established, the panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within nine months after it is established.

Major Issues Raised by Canada

In its request for the establishment of a panel, Canada challenges provisions of the *Agricultural Marketing Act of 1946,* as amended by the *Farm, Security and Rural Investment Act of 2002* (2002 Farm Bill), and *Food, Conservation, and Energy Act, 2008* (2008 Farm Bill), the U.S. Department of Agriculture (''USDA'') Interim Final Rule on COOL published on August 1, 2008 and on August 28, 2008, respectively, the USDA Final Rule on COOL published on January 15, 2009, and a February 20, 2009 letter issued by the Secretary of Agriculture.

Canada alleges that the COOL requirements are inconsistent with the *General Agreement on Tariffs and Trade 1994* (''GATT 1994''), Articles III:4, IX:2, IX:4, and X:3(a), the *Agreement on Technical Barriers to Trade* (''TBT Agreement''), Articles 2.1, 2.2, and 2.4, or in the alternative, the *Agreement on the Application of Sanitary and Phytosanitary Measures* (''SPS Agreement''), Articles 2, 5, and 7, and the *Agreement on Rules of Origin,* Articles 2(b), 2(c), 2(e), and 2(j). Additionally, Canada alleges these violations nullify or impair the benefits accruing to Canada under those Agreements and further appear to nullify or impair the benefits accruing to Canada in the sense of GATT 1994, Article XXIII:1(b).

Major Issues Raised by Mexico

In its request for establishment of a panel, Mexico challenges the *Agricultural Marketing Act of 1946,* as amended by the 2002 and 2008 Farm Bills, the U.S. Department of Agriculture (''USDA'') Interim Final Rule on COOL published on August 1, 2008 and August 28, 2009, respectively, the USDA Final Rule on COOL published on January 15, 2009, and a February 20, 2009 letter issued by the Secretary of Agriculture.

Mexico alleges that the U.S. measures are inconsistent with the GATT 1994, Articles III:4, IX:2, IX:4, and X:3(a), the TBT Agreement, Articles 2.1, 2.2, 2.4, 12.1, and 12.3, or, in the alternative, the SPS Agreement, Articles 2, 5, and 7, and the *Agreement on Rules of Origin,* Articles 2(b), 2(c), 2(d), and 2(e). Additionally, Mexico alleges these violations nullify or impair the benefits accruing to Mexico under those Agreements and further appear to nullify or impair the benefits accruing to Mexico within the meaning of the GATT 1994, Article XXIII:1(b).

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit public comments electronically to *http://www.regulations.gov* docket number USTR–2009–0004. If you are unable to provide submissions by *http://www.regulations.gov,* please contact Sandy McKinzy at (202) 395–9483 to arrange for an alternative method of transmission.

To submit comments via *http://www.regulations.gov*, enter docket number USTR–2009–0004 on the home page and click ''search''. The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Submit a Comment.'' (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use This Site'' on the left side of the home page.)

The *http://www.regulations.gov* site provides the option of providing comments by filling in a ''General Comments'' field, or by attaching a document. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''General Comments'' field.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business

information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page. Any comment containing business confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *http://www.regulations.gov.* The non-confidential summary will be placed in the docket and open to public inspection.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' at the top and bottom of the cover page and each succeeding page; and

(3) Must provide a non-confidential summary of the information or advice.

Any comment containing confidential information must be submitted by fax to Sandy McKinzy at (202) 395–3640. A non-confidential summary of the confidential information must be submitted to *http://www.regulations.gov* or by fax. The non-confidential summary will be placed in the docket and open to public inspection.

USTR will maintain a docket on this dispute settlement proceeding, accessible to the public. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, any non-confidential submissions, or non-confidential summaries of submissions, received from other participants in the dispute; the report of the panel; and, if applicable, the report of the Appellate Body.

Comments will be placed in the docket and open to public inspection pursuant to 15 CFR 2006.13, except confidential business information exempt from public inspection in accordance with 15 CFR 2006.15 or information determined by USTR to be confidential in accordance with 19 U.S.C. § 2155(g)(2). Comments open to public inspection may be viewed on the *http://www.regulations.gov* Web site.

Daniel Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. E9–28904 Filed 12–3–09; 8:45 am]

BILLING CODE 3190–W0–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2009–0113]

Agency Information Collection Activities: Request for Comments for New Information Collection

Correction

In notice document E9–28411 beginning on page 62381 in the issue of Friday, November 27, 2009, make the following correction:

On page 62381, in the second column, under the **DATES** section, in the second line, ''November 27, 2009'' should read '' January 26, 2010''.

[FR Doc. Z9–28411 Filed 12–03–09; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35309]

Reading Blue Mountain and Northern Railroad Company—Acquisition and Operation Exemption—Towanda-Monroeton Shippers' Lifeline, Inc.

Reading Blue Mountain and Northern Railroad Company (RBMN), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire from Towanda-Monroeton Shippers' Lifeline, Inc. (TMSS) and to operate a 4.7-mile line of railroad extending between milepost 249.3 near Monroeton and milepost 254.0 near Towanda in Bradford County, PA.

RBMN certifies that its projected annual revenues as a result of the transaction will not result in the creation of a Class II or Class I rail carrier. However, because its projected annual revenues will exceed $5 million, RBMN also has certified to the Board that it has complied with the employee notice requirements of 49 CFR 1150.42(e). Pursuant to that provision, the exemption may not become effective until 60 days from the October 21, 2009 date of certification to the Board, which would be December 20, 2009. Thus, while RBMN has indicated a proposed consummation date of December 19, 2009, RBMN may not consummate the transaction and commence operating the line prior to December 20, 2009.

In its notice, RBMN states that RBMN will interchange traffic with Lehigh Railway, LLC. RBMN is unaware of any existing interchange commitments and does not contemplate that any will be required as part of this transaction.

Pursuant to the Consolidated Appropriations Act, 2008, Public Law No. 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing, or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by December 11, 2009 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35309, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on applicants' representative, Eric M. Hocky, Thorp Reed & Armstrong, LLP, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103.

Board decisions and notices are available on our Web site at: ''*http://www.stb.dot.gov.*''

Decided: November 24, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E9–28804 Filed 12–3–09; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35321]

KM Railways, LLC—Acquisition Exemption—Old Augusta Railroad, LLC

KM Railways, LLC (KMR), a noncarrier, has filed a verified notice of

exemption under 49 CFR 1150.31 to acquire an approximately 2.5-mile rail line owned by Old Augusta Railroad, LLC (OAR), extending from New Augusta (Station No. FSAC 10) to Augusta (Station No. FSAC 20), in Perry County, MS (line).[1] According to KMR, KMR will acquire the line from OAR pursuant to an executed Asset Purchase Agreement, and, in a related transaction, KMR will lease the track and other physical assets needed to operate the line back to OAR.

This transaction is related to a concurrently filed verified notice of exemption in STB Finance Docket No. 35319, *Old Augusta Railroad, LLC—Lease and Operation Exemption—KM Railways, LLC,* wherein OAR has filed a notice of exemption to lease and operate the line.

The transaction is expected to be consummated on or shortly after December 18, 2009 (30 days after the exemption was filed).

KMR certifies that, as a result of this transaction, it will not become a Class II or Class I rail carrier. In addition, KMR provides that its projected annual revenues will not exceed $5 million.[2]

Pursuant to the Consolidated Appropriations Act, 2008, Public Law 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: Collecting, storing, or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 11, 2009 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35321, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on David H. Coburn, Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW., Washington, DC 20036.

Board decisions and notices are available on our Web site at: *http://www.stb.dot.gov*.

Decided: November 30, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9–28927 Filed 12–3–09; 8:45 am]

BILLING CODE 4915–01–P

[1] KMR states that there are no branch lines and no mileposts.

[2] By letter filed on November 23, 2009, KMR supplemented the notice of exemption advising the Board that the projected annual revenues of KMR will not exceed $5 million.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activity Seeking OMB Approval

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA invites public comments about our intention to request the Office of Management and Budget's (OMB) revision of a current information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 2, 2009, vol. 74, no. 169, page 45516. Aeronautical Chart Point of Sale Survey data will be used by the Federal Aviation Administration to measure management objectives and analyze customer feedback for ISO–9001.

DATES: Please submit comments by January 4, 2010.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Carla Mauney at *Carla.Mauney@faa.gov.*

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: Aeronautical Chart Point of Sale Survey.

Type of Request: New collection.

OMB Control Number: 2120–XXXX.

Forms(s): There are no FAA forms associated with this collection.

Affected Public: An estimated 320 Respondents.

Frequency: This information is collected semi-annually.

Estimated Average Burden per Response: Approximately 5 minutes per response.

Estimated Annual Burden Hours: An estimated 53 hours annually.

Abstract: Survey data will be used by the Federal Aviation Administration to measure management objectives and analyze customer feedback for ISO–9001.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection ways to enhance the quality, utility, and clarity of the information to be collected and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on November 30, 2009.

Carla Mauney,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division AES–200.

[FR Doc. E9–28945 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the purchase of foreign roof tiles made of 40/45 KSI #2, 24 gauge (0.0276) galvanized steel with Kynar PPG 5LR82411 on a Federal-aid/American Recovery and Reinvestment Act project no. X–STP–5900 (180) in Portland, Oregon.

DATES: The effective date of the waiver is December 7, 2009.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via e-mail at *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief

Counsel, (202) 366–4928, or via e-mail at *michael.harkins@dot.gov.* Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the purchase and use of roof tiles made of 40/45 KSI #2, 24 gauge (0.0276) galvanized steel with Kynar PPG 5LR82411 in Oregon State.

In accordance with Division K, section 130 of the Consolidated Appropriations Act, 2008 (Pub. L. 110–161), the FHWA published a notice of intent to issue a waiver on its web site for the roof tiles made of 40/45 KSI #2, 24 gauge (0.0276) galvanized steel with Kynar PPG 5LR82411 (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=39*) on October 22. The FHWA received no comments in response to the roof tiles made of 40/45 KSI #2, 24 gauge (0.0276) galvanized steel with Kynar PPG 5LR82411, which suggests that the roof tiles made of 40/45 KSI #2, 24 gauge (0.0276) galvanized steel with Kynar PPG 5LR82411 may not be available domestically. During the 15-day comment period, the FHWA conducted an additional nationwide review to locate potential domestic manufacturers for the roof tiles made of 40/45 KSI #2, 24 gauge (0.0276) galvanized steel with Kynar PPG 5LR82411. Based on all of the information available to the agency, the FHWA concludes that there are no domestic manufacturers for the roof tiles made of 40/45 KSI #2, 24 gauge (0.0276) galvanized steel with Kynar PPG 5LR82411. Thus, the FHWA concludes that a Buy America waiver is appropriate pursuant to 23 CFR 635.410(c)(1).

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat.1572), the FHWA is providing this notice as its finding that a waiver of the Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of this notice. Comments may be submitted to the FHWA's web site via the link provided to the Oregon waiver page noted above.

Authority: 23 U.S.C. 313; Public Law 110–161, 23 CFR 635.410)

Issued on: November 27, 2009.

Dwight A. Horne,

Director, Office of Program Administration.

[FR Doc. E9–28952 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35320]

Koch Industries, Inc.—Continuance in Control Exemption—KM Railways, LLC

Koch Industries, Inc. (Koch), a noncarrier, has filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to continue in control of KM Railways, LLC (KMR), upon KMR becoming a Class III rail carrier.[1]

This transaction is related to the concurrently filed verified notices of exemption in: (1) STB Finance Docket No. 35321, *KM Railways, LLC—Acquisition Exemption—Old Augusta Railroad, LLC,* in which KMR seeks to acquire the assets of Old Augusta Railroad, LLC (OAR), including the track that constitutes the rail line owned by OAR between New Augusta (Station No. FSAC 10) and Augusta (Station No. FSAC 20), a distance of approximately 2.5 miles in Perry County, MS (the rail line) [2]; and (2) STB Finance Docket No. 35319, *Old Augusta Railroad, LLC—Lease and Operation Exemption—KM Railways,* LLC, in which OAR seeks to lease back, and to operate over, the rail line.

The transactions are scheduled to be consummated on or after December 18, 2009 (30 days after the notices of exemption were filed).

Koch is a noncarrier that currently controls directly or indirectly 3 Class III rail carriers in the states of Mississippi, Kansas, and Texas: OAR, Blue Rapids Railway Company, LLC, and Moscow Camden and San Augustine Railroad, LLC.

Koch states that: (1) The rail line whose assets are to be acquired does not connect with the lines of any other railroad controlled by Koch; (2) the continuance in control is not part of a series of anticipated transactions that would connect the rail line with any railroads controlled by Koch; and (3) the transaction does not involve a Class I railroad. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 11, 2009 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35320, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy must be served on David H. Coburn, Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW., Washington, DC 20036.

Board decisions and notices are available on our Web site at ''*http://www.stb.dot.gov.''*

Decided: November 30, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9–28951 Filed 12–3–09; 8:45 am]

BILLING CODE 4915–01–P

[1] Koch has also concurrently filed a motion for protective order pursuant to 49 CFR 1104.14(b) to allow Koch to file the unredacted Asset Purchase and Sale Agreement under seal. That motion will be addressed in a separate decision.

[2] There are no branch lines and mileposts on the rail line.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35319]

Old Augusta Railroad, LLC—Lease and Operation Exemption—KM Railways, LLC

Old Augusta Railroad, LLC (OAR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease from KM Railways, LLC (KMR), and to operate 2.5 miles of KMR's line of railroad extending from New Augusta (Station No. FSAC 10) to Augusta (Station No. FSAC 20), in Perry County, MS (line).[1]

This transaction is related to a concurrently filed verified notice of exemption in STB Finance Docket No. 35321, *KM Railways, LLC—Acquisition Exemption—Old Augusta Railroad, LLC,* wherein KMR seeks to acquire the line from OAR, which currently owns and operates the line.[2] According to OAR, KMR has entered into a Lease Agreement with OAR under which the line will be leased back to, and operated by, OAR. OAR states that this transaction is an internal reorganization for corporate purposes and that there will be no planned change in the operations presently conducted by OAR.

The transaction is expected to be consummated on or after December 18, 2009, the effective date of the exemption (30 days after the exemption is filed).

OAR certifies that, as a result of this transaction, it will not become a Class II or Class I rail carrier. In addition, OAR provides that its projected annual revenues will not exceed $5 million.[3]

Pursuant to the Consolidated Appropriations Act, 2008, Public Law 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: Collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed by no later than December 11, 2009 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35319 must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy must be served on David H. Coburn, Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW., Washington, DC 20036.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: November 30, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E9–28938 Filed 12–3–09; 8:45 am]

BILLING CODE 4915–01–P

[1] OAR states that there are no branch lines and no mileposts.

[2] *See Old Augusta Railroad, LLC—Acquisition and Operation Exemption—Assts of Old Augusta Railroad Company,* STB Finance Docket No. 34493 (STB served April 21, 2004).

[3] By letter filed on November 23, 2009, OAR supplemented the notice of exemption advising the Board that the projected annual revenues of OAR will not exceed $5 million.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Modification of the Atlanta, GA, Class B Airspace Area; Public Meetings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meetings.

SUMMARY: This notice announces four fact-finding informal airspace meetings to solicit information from airspace users and others, concerning a proposal to revise Class B airspace at Atlanta, GA. The purpose of these meetings is to provide interested parties an opportunity to present views, recommendations, and comments on the proposal. All comments received during these meetings will be considered prior to any issuance of a notice of proposed rulemaking.

DATES: The informal airspace meetings will be held on Monday, February 22, 2010; Thursday, February 25, 2010; Monday, March 1, 2010; and Thursday, March 4, 2010. All meetings will run from 3 p.m. until 8:30 p.m. Comments must be received on or before April 3, 2010.

ADDRESSES: (1) The meeting on Monday, February 22, 2010, will be held at the Cobb Co. PD, Precinct 1, 2380 North Cobb Parkway, Kennessaw, GA 30152 [Call 770–499–4181 for directions]; (2) The meeting on Thursday, February 25, 2010, will be held at the City of Covington City Hall, 2116 Stallings Street NW., Covington, GA 30014 [Call 770–385–2022 for directions]; (3) The meeting on Monday, March 1, 2010, will be held at the Chamblee Civic Center, 3540 Broad Street, Chamblee, GA 30341 [Call 770–986–5016 for directions]; and (4) the meeting on Thursday, March 4, 2010, will be held at Peachtree City Falcon Field, 7 Falcon Drive, Peachtree City, GA 30269 [Call 770–487–2225 for directions].

Comments: Send comments on the proposal, in triplicate, to: Mark Ward, Manager, Operations Support Group, Eastern Service Area, Air Traffic Organization, Federal Aviation Administration, P.O. Box 20636, Atlanta, GA 30320.

FOR FURTHER INFORMATION CONTACT: Mike Richardson, Support Manager, Atlanta TRACON, 784 South Highway 74, Peachtree City, GA; telephone: (678) 364–6306.

SUPPLEMENTARY INFORMATION:

Meeting Procedures

(a) The meetings will be informal in nature and will be conducted by one or more representatives of the FAA Eastern Service Area. A representative from the FAA will present a briefing on the planned Class B airspace area modification. Each participant will be given an opportunity to deliver comments or make a presentation, although a time limit may be imposed. Only comments concerning the plan to modify the Atlanta Class B airspace will be accepted.

(b) The meetings will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(c) Any person wishing to make a presentation to the FAA panel will be asked to sign in and estimate the amount of time needed for such presentation. This will permit the panel to allocate an appropriate amount of time for each presenter. These meetings will not be adjourned until everyone on the list has had an opportunity to address the panel.

(d) Position papers or other handout material relating to the substance of these meetings will be accepted. Participants wishing to submit handout material should present an original and two copies (3 copies total) to the presiding officer. There should be additional copies of each handout available for other attendees.

(e) These meetings will not be formally recorded. However, a summary of comments made at the meetings will be filed in the docket.

Agenda for the Meetings

—Sign-in.
—Presentation of Meeting Procedures.
—Informal Presentation of the planned Class B Airspace area Modification.
—Public Presentations and Discussions.
—Closing Comments.

At all meetings, the informal presentation will be conducted at 3 p.m., 5 p.m., and again at 7 p.m. Each presentation will be the same, so attendees may arrive at any time at their convenience, and it will not be necessary to remain until the end. Following each presentation there will be time for questions and presentations by attendees.

Issued in Washington, DC, on November 23, 2009.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. E9–28900 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 693]

Oral Argument

AGENCY: Surface Transportation Board.

ACTION: Notice of oral argument.

SUMMARY: By a decision served on December 1, 2009, the Board announced that it will hold oral arguments in two cases: STB Finance Docket No. 35225, *San Benito Railroad LLC—Acquisition Exemption—Certain Assets of Union Pacific Railroad Company (San Benito RR)*; and STB Finance Docket No. 35239, *Allegheny Valley Railroad Company—Petition for Declaratory Order (Allegheny Valley)*.

Dates/Location: The oral arguments will take place on Tuesday, January 26, 2010, at 9:30 a.m., in the Board's hearing room at the Board's headquarters located at 395 E Street, SW., Washington, DC. By January 21, 2010, the parties should submit to the Board the name of the counsel who will be presenting argument, the party counsel will be representing, and the requested time reserved for rebuttal if the party is the movant or petitioner.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm, (202) 245–0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: In STB Finance Docket No. 35225, San Benito Railroad LLC (San Benito), a noncarrier, has filed a verified notice of exemption to acquire from Union Pacific Railroad Company (UP) certain railroad assets, including approximately 12.43 miles of rail line extending between approximately milepost 0.7 (near Hollister, CA) and approximately milepost 12.50 (near Carnadero, CA) in San Benito County. San Benito simultaneously filed a motion to dismiss the notice of exemption. San Benito seeks a determination from the Board that it would not become a common carrier and that the Board would not have jurisdiction over the proposed acquisition because the parties have structured the transaction pursuant to the terms and conditions of the Interstate Commerce Commission's decision in *State of Maine—Acq. And Op. Exempt.,* 8 I.C.C.2d 935 (1991) (*State of Maine*), and subsequent Board decisions addressing *State of Maine.*

The Brotherhood of Maintenance of Way Employes Division/IBT and the Brotherhood of Railroad Signalmen (collectively ''Unions'') filed a response in opposition to San Benito's motion to dismiss. The Unions argue that *State of Maine* was wrongly decided and must be overturned because it is contrary to the Interstate Commerce Act. The Board will hear argument on the motion to dismiss the notice of exemption.

In STB Finance Docket No. 35239, Allegheny Valley Railroad Company (AVRR) has filed a petition for declaratory order to determine whether a 0.3-mile rail segment between 16th Street and 21st Street in Pittsburgh, PA, remains an active rail easement. AVRR, which claims that the easement remains active, wants to restore the 0.3-mile segment of the line as part of a longer line and provide passenger and freight rail service over it. AVRR purportedly acquired the easement as part of a line sale by Consolidated Rail Corporation (Conrail). The segment spans property owned by The Buncher Company (Buncher). Buncher claims that the track in question has been abandoned and that the property interest has been extinguished.

On May 13, 2009, the Board instituted a declaratory order proceeding to clarify the issues and established a procedural schedule. The parties submitted several rounds of evidence concerning the status of the track.

On September 17, 2009, the Board issued a decision directing AVRR and Buncher to address whether or how the recent ruling by the United States Court of Appeals for the District of Columbia Circuit in *Consolidated Rail Corp.* v. *STB,* 571 F.3d 13 (D.C. Cir. 2009) (*Harsimus*) affects this case. In *Harsimus,* the Court of Appeals found that where the Board's authority was challenged and an interpretation of the Final System Plan (FSP) for the creation of Conrail or the Special Court's conveyance order under 45 U.S.C. 719(e)(2) for Conrail's creation was required, the Board lacked jurisdiction to resolve the question of the nature of the involved trackage.

AVRR and Buncher filed their evidence on October 9, 2009. AVRR claims that *Harsimus* is limited to its facts and that the Board should resolve the case. Buncher asserts that the Board should dismiss the case in accordance with *Harsimus,* as the resolution of the case relies upon interpreting the FSP and the documents relating to the conveyance to Conrail, thus placing the case directly under the jurisdiction of the Special Court, which is now the United States District Court for the District of Columbia.

The STB requests that all persons attending the hearing use the Patriots Plaza Building's main entrance at 395 E Street, SW. (closest to the northeast corner of the intersection of 4th and E Streets). There will be no reserved seating, except for those scheduled to present oral arguments. The building will be open to the public at 7 a.m., and participants are encouraged to arrive early. There is no public parking in the building. The oral arguments will be open for public observation, but only counsel for the parties will be permitted to present argument. A video broadcast of the oral argument will be available via the Board's Web site at *http://www.stb.dot.gov,* under ''Information Center''/''Webcast''/''Live Video'' on the home page.

Additional information is contained in the Board's decision. A copy of the Board's decision is available for inspection or copying at the Board's Public Docket Room, Room 131, 395 E Street, SW., Washington, DC 20423–0001, and is posted on the Board's Web site, *http://www.stb.dot.gov.*

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: December 1, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9–28956 Filed 12–3–09; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Vehicle Theft Prevention Standard; Volkswagen

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the petition of Volkswagen Group of America (VW) in accordance with § 543.9(c)(2) of 49 CFR Part 543, *Exemption from the Theft Prevention Standard,* for the Volkswagen Tiguan vehicle line beginning with model year (MY) 2011. This petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard.

DATES: The exemption granted by this notice is effective beginning with model year (MY) 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Mazyck, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, 1200 New Jersey Avenue, SE., West Building, W43–443, Washington, DC 20590. Ms. Mazyck's phone number is (202) 366–0846. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: In a petition dated August 26, 2009, VW requested an exemption from the parts-marking requirements of the Theft Prevention Standard (49 CFR Part 541) for the Volkswagen Tiguan vehicle line beginning with MY 2010. The petition requested an exemption from parts-marking pursuant to 49 CFR Part 543, *Exemption from Vehicle Theft Prevention Standard,* based on the installation of an antitheft device as standard equipment for an entire vehicle line.

Under § 543.5(a), a manufacturer may petition NHTSA to grant an exemption for one vehicle line per model year. In its petition, VW provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for its new Volkswagen Tiguan vehicle line. VW will install its fourth generation, transponder-based electronic engine immobilizer antitheft device as standard equipment on its Volkswagen Tiguan vehicle line beginning with MY 2011. VW stated that its fourth generation immobilizer actively incorporates the engine control unit into the evaluation and monitoring processes. Key components of the antitheft device will include a passive immobilizer, an immobilizer control unit, a mechanical ignition lock with immobilizer reading coil, an adapted ignition key, and an engine control unit. The antitheft device will not include an audible or visible alarm feature as standard equipment. VW's submission is considered a complete petition as required by 49 CFR 543.7, in that it meets the general requirements contained in § 543.5 and the specific content requirements of § 543.6.

VW stated that once the driver/operator turns on the ignition, the key transponder sends a fixed code to the immobilizer control unit. If this is identified as the correct code, a variable code is generated in the immobilizer control unit and sent to the transponder. A secret arithmetic process is then started in the transponder and the control unit according to a set of specific equations. The results of the computing process is evaluated in the control unit and if they tally, the vehicle key is acknowledged as correct. The engine control unit then sends a variable code to the immobilizer control unit, enabling start up of the vehicle. VW stated that a new variable code is generated each time during this secret computing process. Therefore, VW believes that the code is undecipherable.

In addressing the specific content requirements of 543.6, VW provided information on the reliability and durability of its proposed device. To ensure reliability and durability of the device, VW conducted tests based on its own specified standards. VW provided a detailed list of the tests conducted (*i.e.,* electrical system temperature stability, mechanical integrity, electrical performance, environmental compatibility and service life) and believes that the device is reliable and durable since the device complied with its specific requirements for each test. Additionally, VW stated that after recognition by the electronic module of the key transponder, a pairing between the key and the immobilizer occurs at which point the key can no longer be used for any other immobilizer.

VW stated that the Volkswagen Tiguan was introduced in the 2009 model year as a parts-marked vehicle, therefore no theft data is available. VW also provided data on the theft reduction benefits experienced by other vehicle lines installed with immobilizer devices that have recently been granted petitions for exemptions by the agency. VW has concluded that the antitheft device proposed for its Volkswagen Tiguan vehicle line is no less effective than those devices in the lines for which NHTSA has already granted full exemption from the parts-marking requirements. The agency agrees that the device is substantially similar to devices in these and other vehicle lines for which the agency has already granted exemptions.

Based on the evidence submitted by VW, the agency believes that the antitheft device for the Volkswagen Tiguan vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the part-marking requirements of the Theft Prevention Standard.

Pursuant to 49 U.S.C. 33106 and 49 CFR 543.7(b), the agency grants a petition for exemption from the parts-marking requirements of part 541 either in whole or in part, if it determines that, based upon substantial evidence, the standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts marking requirements of part 541. The agency finds that VW has provided adequate reasons for its belief that the antitheft device for the Volkswagen Tiguan vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard (49 CFR Part 541). This conclusion is based on the information VW provided about its device.

The agency concludes that the device will provide four of the five types of performance listed in § 543.6(a)(3): promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

For the foregoing reasons, the agency hereby grants in full VW's petition for exemption for the Volkswagen Tiguan vehicle line from the parts-marking requirements of 49 CFR Part 541. The agency notes that 49 CFR Part 541, Appendix A–1, identifies those lines that are exempted from the Theft Prevention Standard for a given model year. 49 CFR Part 543.7(f) contains publication requirements incident to the disposition of all Part 543 petitions. Advanced listing, including the release of future product nameplates, the beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts-marking

requirements of the Theft Prevention Standard.

If VW decides not to use the exemption for this line, it must formally notify the agency. If such a decision is made, the line must be fully marked according to the requirements under 49 CFR Parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if VW wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the anti-theft device on which the line's exemption is based. Further, Part 543.9(c)(2) provides for the submission of petitions ''to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption.''

The agency wishes to minimize the administrative burden that Part 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting Part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis.* Therefore, NHTSA suggests that if the manufacturer contemplates making any changes, the effects of which might be characterized as *de minimis,* it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on: December 1, 2009.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E9–29013 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35305]

Arkansas Electric Cooperative Corporation—Petition for Declaratory Order

AGENCY: Surface Transportation Board, DOT.

ACTION: Institution of declaratory order proceeding; request for notices of intent to participate and comments; and issuance of procedural schedule.

SUMMARY: In response to a petition filed by Arkansas Electric Cooperative Corporation (AECC) on October 2, 2009, and the reply of BNSF Railway Company (BNSF), the Board is instituting a declaratory order proceeding under 49 U.S.C. 721 and 5 U.S.C. 554(e).[1] The issues before the Board arise from Tariff 6041–B Items 100 and 101 (Tariff provisions), issued by BNSF on May 27, 2009, which require that Powder River Basin (PRB) coal shippers using the Joint Line [2] or the Black Hills Subdivision must ensure that the emission of coal dust from the cars does not exceed the coal dust emissions standards set by BNSF. The issues raised in these filings include: (1) Whether the Tariff provisions constitute an unreasonable rule or practice; (2) whether BNSF may establish rules designed to inhibit the dispersion of coal dust from coal trains operating over its lines; and (3) whether refusal to provide service for non-compliance with the Tariff provisions or other actions to enforce compliance would violate BNSF's common carrier obligation. Due to the vital role transportation of coal by rail plays in the nation's energy supply and the economy in general, the Board seeks public comment and participation on this matter.

DATES: The effective date of this decision is December 1, 2009. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than December 11, 2009, a notice of intent to participate. Discovery will close on February 1, 2010. Opening evidence and argument from all PORs is due on March 16, 2010. Reply evidence and argument from all PORs is due on April 30, 2010. Rebuttal evidence and argument from all PORs is due on May 17, 2010.[3]

ADDRESSES: Any filing submitted in this proceeding must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E–FILING link on the Board's Web site, at *http://www.stb.dot.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies (and also an electronic version), referring to STB Finance Docket No. 35305, to: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Eric Von Salzen (representing AECC), McLeod, Watkinson & Miller, One Massachusetts Avenue, NW., Suite 800, Washington, DC 20001; (2) Samuel M. Sipe, Jr. (representing BNSF), Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW., Washington, DC 20036; (3) Joe Rebein (representing UP), Shook, Hardy & Bacon LLP, 2555 Grand Blvd., Kansas City, Missouri 64108; (4) John H. LeSeur (representing Western Coal Traffic League (WCTL)), Slover & Loftus LLP, 1224 Seventeenth Street, NW., Washington, DC 20036; and (5) any other person designated as a POR on the service-list notice (as explained below, the service-list notice will be issued as soon after December 11, 2009, as practicable).

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 245–0395. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1–800–877–8339].

SUPPLEMENTARY INFORMATION: AECC is a generation and transmission cooperative that provides wholesale electric power to electric cooperatives throughout Arkansas. AECC is a co-owner, with other utilities, of generation assets that burn millions of tons of PRB coal annually. During normal operating conditions, three of these plants—White Bluff at Redfield, AR, Independence at Newark, AR, and Flint Creek at Gentry, AR—receive all of their PRB coal via the Joint Line. On May 27, 2009, BNSF issued the Tariff provisions stating that ''[e]ffective November 1, 2009, Shipper shall take all steps necessary to ensure that Trains handling cars loaded with Coal from any mine origin that move over [the Joint Line or Black Hills Subdivision] shall not emit more than an Integrated Dust Value (IDV.2) of [300 units or 245 units, respectively] in order to enhance retention of coal in rail cars.'' AECC seeks a declaratory order stating that the Tariff provisions constitute an unreasonable rule or practice and an illegal refusal to provide service. AECC also asks that the order state that BNSF must permit shippers to transport coal on the Joint Line and Black Hills Subdivision without such restrictions.

[1] By a separate decision, the Board will address the imposition of a protective order in this proceeding.

[2] The Joint Line is the rail line serving the southern PRB that is jointly owned by BNSF and the Union Pacific Railroad Company (UP) and operated and maintained by BNSF.

[3] Although oral argument on these issues was requested by BNSF, we are not ruling on that request at this time.

On October 21, 2009, BNSF, a Class-I rail carrier operating in the western United States, replied to AECC's petition contesting, among other things, AECC's underlying presumption that the Tariff provisions are injurious to coal shippers. BNSF states that coal dust contaminates the ballast and can impact ballast integrity, ultimately causing derailments. Therefore, BNSF claims the Tariff provisions are intended to promote the safe, efficient, and uninterrupted flow of coal from mine to generating station. BNSF itself requests the Board issue a declaratory order stating that (1) BNSF is entitled to establish rules designed to inhibit the dispersion of coal dust over its lines in the interest of safe and efficient rail operations and of reliability of service on its rail lines; and (2) BNSF's Tariff provisions are not unreasonable.

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. The issues raised by AECC and BNSF merit further consideration. A declaratory order proceeding is thus instituted in this proceeding.

We received, on October 22, 2009, a letter from WCTL requesting that we accept public input on the declaratory order proceeding.[4] Due to the significance of this matter to coal shippers, railroads, and other interested parties, we are opening this declaratory order proceeding for public participation. Any person who wishes to participate in this proceeding as a POR must file, no later than December 11, 2009, a notice of intent to participate and must adhere to the procedural schedule established in the Appendix. To ensure each POR receives all filings, the Board will serve, as soon after as practicable, a notice containing the official service list (the service-list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service-list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR also will be required to file with the Board, within 10 days of the service date of the service-list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR after the service date of the service-list notice must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress and Governors are not parties of record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a POR.

In their filings, AECC and BNSF discuss the alleged adverse effects of coal dust on rail roadbeds and ballast, implicating safety and environmental issues. Because the Board's consideration of the issues raised in this proceeding could relate to other Federal agencies' areas of expertise, any agency with an interest in the outcome of these issues is encouraged to comment.

Both AECC and BNSF request that a procedural schedule be adopted. They both request that we allow for a 60-day period of discovery. While the legal nature of a declaratory order proceeding might not always necessitate discovery, due to the factually intense nature of the dispute here we will permit discovery among BNSF, AECC, and any other shippers potentially affected by the tariff, including shipper organizations that represent those shippers. These entities may conduct discovery pursuant to the Board's regulations at 49 CFR 1114.21, *et seq*. In the interests of ensuring the necessary discovery is obtained in a timely and efficient manner, we will assign and authorize a Board employee to act as a discovery facilitator to entertain and rule upon all disputes concerning discovery in this proceeding. Any appeals of decisions by the discovery facilitator must be filed within 3 business days of the date of the action and responses to appeals must be filed within 3 business days thereafter. Appeals will be governed by the standard at 49 CFR 1115.1(c).[5]

Board decisions, notices, and filings in this and other Board proceedings are available on our Web site at *http://www.stb.dot.gov*.

Decided: November 30, 2009.

It is ordered:

1. A declaratory order proceeding under 5 U.S.C. 554 and 49 U.S.C. 721 is instituted.

2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in the Appendix.

3. The parties to this proceeding must comply with the procedural requirements described in this decision.

4. The special appellate procedures set forth in this decision will apply to rulings made by the Board employee assigned to act as a discovery facilitator in this matter.

5. This decision is effective on December 1, 2009.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Kulunie L. Cannon,

Clearance Clerk.

Appendix

Procedural Schedule

December 1, 2009	Declaratory order proceeding instituted.
December 11, 2009	Notices of intent to participate due.
February 1, 2010	Close of discovery.
March 16, 2010	Opening evidence and argument due from all PORs.
April 30, 2010	Reply evidence and argument due from all PORs.
May 17, 2010	Rebuttal evidence and argument due from all PORs.

[FR Doc. E9–28936 Filed 12–3–09; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Michael Behe representing FRN, LLC (WB604–8—11/18/09) for permission to use certain data from the Board's 2008 Carload Waybill Sample. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data;

[4] WCTL also requested leave to intervene, to which UP replied on October 28, 2009. In a separate filing on October 21, 2009, UP also requested leave to intervene. Because we are inviting public participation in this proceeding, we need not address the requests for leave to intervene, but we have made the requesting parties PORs.

[5] 49 CFR 1115.1(c) states, in relevant part, that ''appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.''

therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Scott Decker, (202) 245–0330.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. E9–28957 Filed 12–3–09; 8:45 am]

BILLING CODE 4915–01–P

UNITED STATES MINT

Pricing Methodology for Numismatic Products Containing Gold and Platinum Coins; Expansion of Schedule Range

AGENCY: United States Mint.

ACTION: Notice.

SUMMARY: The United States Mint published a document in the **Federal Register** of January 6, 2009, outlining the new pricing methodology for numismatic products containing gold and platinum coins. The document contained schedules for pricing based on a range of average prices of gold and platinum. These schedules now need to be expanded to higher ranges to accommodate rising prices of gold and platinum.

FOR FURTHER INFORMATION CONTACT: B.B. Craig, Associate Director for Sales and Marketing; United States Mint; 801 Ninth Street, NW., Washington, DC 20220; or call 202–354–7500.

SUPPLEMENTARY INFORMATION: The gold and platinum schedules, published in the **Federal Register** of January 6, 2009 (74 FR 493), in FR Doc. E8–31424, are updated to read as follows:

BILLING CODE P

PRICING OF NUMISMATIC PRODUCTS CONTAINING GOLD COINS (Note 1)

Average Price of Gold				American Buffalo Gold Proof	American Buffalo Gold Uncirculated	American Eagle Gold Proof	American Eagle Gold Uncirculated	Celebration Coin	8-8-08 Double Prosperity	First Spouse 24K Proof	First Spouse 24K Uncirculated	2009 United States Mint Ultra High Relief Double Eagle Gold Coin
$500.00	to	$549.99	1 oz	$810.00	$808.00	$785.00	$778.00	$797.00	$825.00			$889.00
			1/2 oz	$432.00	$429.00	$406.00	$400.00			$429.00	$416.00	
			1/4 oz	$241.50	$239.00	$215.50	$209.50					
			1/10 oz	$127.00	$124.00	$100.50	$94.50					
			4 coins	$1,488.00	$1,485.00	$1,458.00	$1,450.00					
$550.00	to	$599.99	1 oz	$860.00	$858.00	$835.00	$828.00	$847.00	$875.00			$939.00
			1/2 oz	$457.00	$454.00	$431.00	$425.00			$454.00	$441.00	
			1/4 oz	$254.00	$251.50	$228.00	$222.00					
			1/10 oz	$132.00	$129.00	$105.50	$99.50					
			4 coins	$1,580.50	$1,577.50	$1,550.50	$1,542.50					
$600.00	to	$649.99	1 oz	$910.00	$908.00	$885.00	$878.00	$897.00	$925.00			$989.00
			1/2 oz	$482.00	$479.00	$456.00	$450.00			$479.00	$466.00	
			1/4 oz	$266.50	$264.00	$240.50	$234.50					
			1/10 oz	$137.00	$134.00	$110.50	$104.50					
			4 coins	$1,673.00	$1,670.00	$1,643.00	$1,635.00					
$650.00	to	$699.99	1 oz	$960.00	$958.00	$935.00	$928.00	$947.00	$975.00			$1,039.00
			1/2 oz	$507.00	$504.00	$481.00	$475.00			$504.00	$491.00	
			1/4 oz	$279.00	$276.50	$253.00	$247.00					
			1/10 oz	$142.00	$139.00	$115.50	$109.50					
			4 coins	$1,765.50	$1,762.50	$1,735.50	$1,727.50					
$700.00	to	$749.99	1 oz	$1,010.00	$1,008.00	$985.00	$978.00	$997.00	$1,025.00			1,089.00
			1/2 oz	$532.00	$529.00	$506.00	$500.00			$529.00	$516.00	
			1/4 oz	$291.50	$289.00	$265.50	$259.50					
			1/10 oz	$147.00	$144.00	$120.50	$114.50					
			4 coins	$1,858.00	$1,855.00	$1,828.00	$1,820.00					
$750.00	to	$799.99	1 oz	$1,060.00	$1,058.00	$1,035.00	$1,028.00	$1,047.00	$1,075.00			$1,139.00
			1/2 oz	$557.00	$554.00	$531.00	$525.00			$554.00	$541.00	
			1/4 oz	$304.00	$301.50	$278.00	$272.00					
			1/10 oz	$152.00	$149.00	$125.50	$119.50					
			4 coins	$1,950.50	$1,947.50	$1,920.50	$1,912.50					

PRICING OF NUMISMATIC PRODUCTS
CONTAINING GOLD COINS (Note 1)

Average Price of Gold				American Buffalo Gold Proof	American Buffalo Gold Uncirculated	American Eagle Gold Proof	American Eagle Gold Uncirculated	Celebration Coin	8-8-08 Double Prosperity	First Spouse 24K Proof	First Spouse 24K Uncirculated	2009 United States Mint Ultra High Relief Double Eagle Gold Coin
$800.00	to	$849.99	1 oz	$1,110.00	$1,108.00	$1,085.00	$1,078.00	$1,097.00	$1,125.00			$1,189.00
			1/2 oz	$582.00	$579.00	$556.00	$550.00			$579.00	$566.00	
			1/4 oz	$316.50	$314.00	$290.50	$284.50					
			1/10 oz	$157.00	$154.00	$130.50	$124.50					
			4 coins	$2,043.00	$2,040.00	$2,013.00	$2,005.00					
$850.00	to	$899.99	1 oz	$1,160.00	$1,158.00	$1,135.00	$1,128.00	$1,147.00	$1,175.00			$1,239.00
			1/2 oz	$607.00	$604.00	$581.00	$575.00			$604.00	$591.00	
			1/4 oz	$329.00	$326.50	$303.00	$297.00					
			1/10 oz	$162.00	$159.00	$135.50	$129.50					
			4 coins	$2,135.50	$2,132.50	$2,105.50	$2,097.50					
$900.00	to	$949.99	1 oz	$1,210.00	$1,208.00	$1,185.00	$1,178.00	$1,197.00	$1,225.00			$1,289.00
			1/2 oz	$632.00	$629.00	$606.00	$600.00			$629.00	$616.00	
			1/4 oz	$341.50	$339.00	$315.50	$309.50					
			1/10 oz	$167.00	$164.00	$140.50	$134.50					
			4 coins	$2,228.00	$2,225.00	$2,198.00	$2,190.00					
$950.00	to	$999.99	1 oz	$1,260.00	$1,258.00	$1,235.00	$1,228.00	$1,247.00	$1,275.00			$1,339.00
			1/2 oz	$657.00	$654.00	$631.00	$625.00			$654.00	$641.00	
			1/4 oz	$354.00	$351.50	$328.00	$322.00					
			1/10 oz	$172.00	$169.00	$145.50	$139.50					
			4 coins	$2,320.50	$2,317.50	$2,290.50	$2,282.50					
$1,000.00	to	$1,049.99	1 oz	$1,310.00	$1,308.00	$1,285.00	$1,278.00	$1,297.00	$1,325.00			$1,389.00
			1/2 oz	$682.00	$679.00	$656.00	$650.00			$679.00	$666.00	
			1/4 oz	$366.50	$364.00	$340.50	$334.50					
			1/10 oz	$177.00	$174.00	$150.50	$144.50					
			4 coins	$2,413.00	$2,410.00	$2,383.00	$2,375.00					
$1,050.00	to	$1,099.99	1 oz	$1,360.00	$1,358.00	$1,335.00	$1,328.00	$1,347.00	$1,375.00			$1,439.00
			1/2 oz	$707.00	$704.00	$681.00	$675.00			$704.00	$691.00	
			1/4 oz	$379.00	$376.50	$353.00	$347.00					
			1/10 oz	$182.00	$179.00	$155.50	$149.50					
			4 coins	$2,505.50	$2,502.50	$2,475.50	$2,467.50					
$1,100.00	to	$1,149.99	1 oz	$1,410.00	$1,408.00	$1,385.00	$1,378.00	$1,397.00	$1,425.00			$1,489.00
			1/2 oz	$732.00	$729.00	$706.00	$700.00			$729.00	$716.00	
			1/4 oz	$391.50	$389.00	$365.50	$359.50					
			1/10 oz	$187.00	$184.00	$160.50	$154.50					
			4 coins	$2,598.00	$2,595.00	$2,568.00	$2,560.00					

PRICING OF NUMISMATIC PRODUCTS CONTAINING GOLD COINS (Note 1)

Average Price of Gold				American Buffalo Gold Proof	American Buffalo Gold Uncirculated	American Eagle Gold Proof	American Eagle Gold Uncirculated	Celebration Coin	8-8-08 Double Prosperity	First Spouse 24K Proof	First Spouse 24K Uncirculated	2009 United States Mint Ultra High Relief Double Eagle Gold Coin
$1,150.00	to $1,199.99	1 oz		$1,460.00	$1,458.00	$1,435.00	$1,428.00	$1,447.00	$1,475.00			$1,539.00
		1/2 oz		$757.00	$754.00	$731.00	$725.00			$754.00	$741.00	
		1/4 oz		$404.00	$401.50	$378.00	$372.00					
		1/10 oz		$192.00	$189.00	$165.50	$159.50					
		4 coins		$2,690.50	$2,687.50	$2,660.50	$2,652.50					
$1,200.00	to $1,249.99	1 oz		$1,510.00	$1,508.00	$1,485.00	$1,478.00	$1,497.00	$1,525.00			$1,589.00
		1/2 oz		$782.00	$779.00	$756.00	$750.00			$779.00	$766.00	
		1/4 oz		$416.50	$414.00	$390.50	$384.50					
		1/10 oz		$197.00	$194.00	$170.50	$164.50					
		4 coins		$2,783.00	$2,780.00	$2,753.00	$2,745.00					
$1,250.00	to $1,299.99	1 oz		$1,560.00	$1,558.00	$1,535.00	$1,528.00	$1,547.00	$1,575.00			$1,639.00
		1/2 oz		$807.00	$804.00	$781.00	$775.00			$804.00	$791.00	
		1/4 oz		$429.00	$426.50	$403.00	$397.00					
		1/10 oz		$202.00	$199.00	$175.50	$169.50					
		4 coins		$2,875.50	$2,872.50	$2,845.50	$2,837.50					
$1,300.00	to $1,349.99	1 oz		$1,610.00	$1,608.00	$1,585.00	$1,578.00	$1,597.00	$1,625.00			$1,689.00
		1/2 oz		$832.00	$829.00	$806.00	$800.00			$829.00	$816.00	
		1/4 oz		$441.50	$439.00	$415.50	$409.50					
		1/10 oz		$207.00	$204.00	$180.50	$174.50					
		4 coins		$2,968.00	$2,965.00	$2,938.00	$2,930.00					
$1,350.00	to $1,399.99	1 oz		$1,660.00	$1,658.00	$1,635.00	$1,628.00	$1,647.00	$1,675.00			$1,739.00
		1/2 oz		$857.00	$854.00	$831.00	$825.00			$854.00	$841.00	
		1/4 oz		$454.00	$451.50	$428.00	$422.00					
		1/10 oz		$212.00	$209.00	$185.50	$179.50					
		4 coins		$3,060.50	$3,057.50	$3,030.50	$3,022.50					
$1,400.00	to $1,449.99	1 oz		$1,710.00	$1,708.00	$1,685.00	$1,678.00	$1,697.00	$1,725.00			$1,789.00
		1/2 oz		$882.00	$879.00	$856.00	$850.00			$879.00	$866.00	
		1/4 oz		$466.50	$464.00	$440.50	$434.50					
		1/10 oz		$217.00	$214.00	$190.50	$184.50					
		4 coins		$3,153.00	$3,150.00	$3,123.00	$3,115.00					

PRICING OF NUMISMATIC PRODUCTS CONTAINING GOLD COINS (Note 1)

Average Price of Gold				American Buffalo Gold Proof	American Buffalo Gold Uncirculated	American Eagle Gold Proof	American Eagle Gold Uncirculated	Celebration Coin	8-8-08 Double Prosperity	First Spouse 24K Proof	First Spouse 24K Uncirculated	2009 United States Mint Ultra High Relief Double Eagle Gold Coin
$1,450.00	to	$1,499.99	1 oz	$1,760.00	$1,758.00	$1,735.00	$1,728.00	$1,747.00	$1,775.00			$1,839.00
			1/2 oz	$907.00	$904.00	$881.00	$875.00			$904.00	$891.00	
			1/4 oz	$479.00	$476.50	$453.00	$447.00					
			1/10 oz	$222.00	$219.00	$195.50	$189.50					
			4 coins	$3,245.50	$3,242.50	$3,215.50	$3,207.50					
$1,500.00	to	$1,549.99	1 oz	$1,810.00	$1,808.00	$1,785.00	$1,778.00	$1,797.00	$1,825.00			$1,889.00
			1/2 oz	$932.00	$929.00	$906.00	$900.00			$929.00	$916.00	
			1/4 oz	$491.50	$489.00	$465.50	$459.50					
			1/10 oz	$227.00	$224.00	$200.50	$194.50					
			4 coins	$3,338.00	$3,335.00	$3,308.00	$3,300.00					
$1,550.00	to	$1,599.99	1 oz	$1,860.00	$1,858.00	$1,835.00	$1,828.00	$1,847.00	$1,875.00			$1,939.00
			1/2 oz	$957.00	$954.00	$931.00	$925.00			$954.00	$941.00	
			1/4 oz	$504.00	$501.50	$478.00	$472.00					
			1/10 oz	$232.00	$229.00	$205.50	$199.50					
			4 coins	$3,430.50	$3,427.50	$3,400.50	$3,392.50					
$1,600.00	to	$1,649.99	1 oz	$1,910.00	$1,908.00	$1,885.00	$1,878.00	$1,897.00	$1,925.00			$1,989.00
			1/2 oz	$982.00	$979.00	$956.00	$950.00			$979.00	$966.00	
			1/4 oz	$516.50	$514.00	$490.50	$484.50					
			1/10 oz	$237.00	$234.00	$210.50	$204.50					
			4 coins	$3,523.00	$3,520.00	$3,493.00	$3,485.00					
$1,650.00	to	$1,699.99	1 oz	$1,960.00	$1,958.00	$1,935.00	$1,928.00	$1,947.00	$1,975.00			$2,039.00
			1/2 oz	$1,007.00	$1,004.00	$981.00	$975.00			$1,004.00	$991.00	
			1/4 oz	$529.00	$526.50	$503.00	$497.00					
			1/10 oz	$242.00	$239.00	$215.50	$209.50					
			4 coins	$3,615.50	$3,612.50	$3,585.50	$3,577.50					
$1,700.00	to	$1,749.99	1 oz	$2,010.00	$2,008.00	$1,985.00	$1,978.00	$1,997.00	$2,025.00			$2,089.00
			1/2 oz	$1,032.00	$1,029.00	$1,006.00	$1,000.00			$1,029.00	$1,016.00	
			1/4 oz	$541.50	$539.00	$515.50	$509.50					
			1/10 oz	$247.00	$244.00	$220.50	$214.50					
			4 coins	$3,708.00	$3,705.00	$3,678.00	$3,670.00					
$1,750.00	to	$1,799.99	1 oz	$2,060.00	$2,058.00	$2,035.00	$2,028.00	$2,047.00	$2,075.00			$2,139.00
			1/2 oz	$1,057.00	$1,054.00	$1,031.00	$1,025.00			$1,054.00	$1,041.00	
			1/4 oz	$554.00	$551.50	$528.00	$522.00					
			1/10 oz	$252.00	$249.00	$225.50	$219.50					
			4 coins	$3,800.50	$3,797.50	$3,770.50	$3,762.50					

PRICING OF NUMISMATIC PRODUCTS CONTAINING GOLD COINS (Note 1)

Average Price of Gold				American Buffalo Gold Proof	American Buffalo Gold Uncirculated	American Eagle Gold Proof	American Eagle Gold Uncirculated	Celebration Coin	8-8-08 Double Prosperity	First Spouse 24K Proof	First Spouse 24K Uncirculated	2009 United States Mint Ultra High Relief Double Eagle Gold Coin
$1,800.00	to	$1,849.99	1 oz	$2,110.00	$2,108.00	$2,085.00	$2,078.00	$2,097.00	$2,125.00			$2,189.00
			1/2 oz	$1,082.00	$1,079.00	$1,056.00	$1,050.00			$1,079.00	$1,066.00	
			1/4 oz	$566.50	$564.00	$540.50	$534.50					
			1/10 oz	$257.00	$254.00	$230.50	$224.50					
			4 coins	$3,893.00	$3,890.00	$3,863.00	$3,855.00					
$1,850.00	to	$1,899.99	1 oz	$2,160.00	$2,158.00	$2,135.00	$2,128.00	$2,147.00	$2,175.00			$2,239.00
			1/2 oz	$1,107.00	$1,104.00	$1,081.00	$1,075.00			$1,104.00	$1,091.00	
			1/4 oz	$579.00	$576.50	$553.00	$547.00					
			1/10 oz	$262.00	$259.00	$235.50	$229.50					
			4 coins	$3,985.50	$3,982.50	$3,955.50	$3,947.50					
$1,900.00	to	$1,949.99	1 oz	$2,210.00	$2,208.00	$2,185.00	$2,178.00	$2,197.00	$2,225.00			$2,289.00
			1/2 oz	$1,132.00	$1,129.00	$1,106.00	$1,100.00			$1,129.00	$1,116.00	
			1/4 oz	$591.50	$589.00	$565.50	$559.50					
			1/10 oz	$267.00	$264.00	$240.50	$234.50					
			4 coins	$4,078.00	$4,075.00	$4,048.00	$4,040.00					
$1,950.00	to	$1,999.99	1 oz	$2,260.00	$2,258.00	$2,235.00	$2,228.00	$2,247.00	$2,275.00			$2,339.00
			1/2 oz	$1,157.00	$1,154.00	$1,131.00	$1,125.00			$1,154.00	$1,141.00	
			1/4 oz	$604.00	$601.50	$578.00	$572.00					
			1/10 oz	$272.00	$269.00	$245.50	$239.50					
			4 coins	$4,170.50	$4,167.50	$4,140.50	$4,132.50					
$2,000.00	to	$2,049.99	1 oz	$2,310.00	$2,308.00	$2,285.00	$2,278.00	$2,297.00	$2,325.00			$2,389.00
			1/2 oz	$1,182.00	$1,179.00	$1,156.00	$1,150.00			$1,179.00	$1,166.00	
			1/4 oz	$616.50	$614.00	$590.50	$584.50					
			1/10 oz	$277.00	$274.00	$250.50	$244.50					
			4 coins	$4,263.00	$4,260.00	$4,233.00	$4,225.00					

Note 1: The price of each gold product consists of the following components: cost of metal, cost to manufacture (including overhead) and margin. The pricing schedule is based upon a spot price of gold at $1100.00 per FTO. At this spot price, the respective approximate average ranges for each component as a percentage of total price are as follows: cost of metal 66%-74%, cost to manufacture (including overhead) 11% to 19%, and margin 13%.

PRICING OF NUMISMATIC PRODUCTS CONTAINING PLATINUM COINS (Note 2)

Average Price of Platinum				American Eagle Platinum Proof	American Eagle Platinum Uncirculated	American Eagle 10th Anniversary
$550.00	to	$649.99	1 oz	$892.00	$885.00	$930.00
			1/2 oz	$462.00	$455.00	
			1/4 oz	$246.00	$240.00	
			1/10 oz	$117.00	$111.50	
			4 coins	$1,670.00	$1,660.00	
$650.00	to	$749.99	1 oz	$992.00	$985.00	$1,030.00
			1/2 oz	$512.00	$505.00	
			1/4 oz	$271.00	$265.00	
			1/10 oz	$127.00	$121.50	
			4 coins	$1,855.00	$1,845.00	
$750.00	to	$849.99	1 oz	$1,092.00	$1,085.00	$1,130.00
			1/2 oz	$562.00	$555.00	
			1/4 oz	$296.00	$290.00	
			1/10 oz	$137.00	$131.50	
			4 coins	$2,040.00	$2,030.00	
$850.00	to	$949.99	1 oz	$1,192.00	$1,185.00	$1,230.00
			1/2 oz	$612.00	$605.00	
			1/4 oz	$321.00	$315.00	
			1/10 oz	$147.00	$141.50	
			4 coins	$2,225.00	$2,215.00	
$950.00	to	$1,049.99	1 oz	$1,292.00	$1,285.00	$1,330.00
			1/2 oz	$662.00	$655.00	
			1/4 oz	$346.00	$340.00	
			1/10 oz	$157.00	$151.50	
			4 coins	$2,410.00	$2,400.00	
$1,050.00	to	$1,149.99	1 oz	$1,392.00	$1,385.00	$1,430.00
			1/2 oz	$712.00	$705.00	
			1/4 oz	$371.00	$365.00	
			1/10 oz	$167.00	$161.50	
			4 coins	$2,595.00	$2,585.00	
$1,150.00	to	$1,249.99	1 oz	$1,492.00	$1,485.00	$1,530.00
			1/2 oz	$762.00	$755.00	
			1/4 oz	$396.00	$390.00	
			1/10 oz	$177.00	$171.50	
			4 coins	$2,780.00	$2,770.00	
$1,250.00	to	$1,349.99	1 oz	$1,592.00	$1,585.00	$1,630.00
			1/2 oz	$812.00	$805.00	
			1/4 oz	$421.00	$415.00	
			1/10 oz	$187.00	$181.50	
			4 coins	$2,965.00	$2,955.00	
$1,350.00	to	$1,449.99	1 oz	$1,692.00	$1,685.00	$1,730.00
			1/2 oz	$862.00	$855.00	
			1/4 oz	$446.00	$440.00	
			1/10 oz	$197.00	$191.50	
			4 coins	$3,150.00	$3,140.00	
$1,450.00	to	$1,549.99	1 oz	$1,792.00	$1,785.00	$1,830.00
			1/2 oz	$912.00	$905.00	
			1/4 oz	$471.00	$465.00	
			1/10 oz	$207.00	$201.50	
			4 coins	$3,335.00	$3,325.00	

PRICING OF NUMISMATIC PRODUCTS CONTAINING PLATINUM COINS (Note 2)

Average Price of Platinum				American Eagle Platinum Proof	American Eagle Platinum Uncirculated	American Eagle 10th Anniversary
$1,550.00	to	$1,649.99	1 oz	$1,892.00	$1,885.00	$1,930.00
			1/2 oz	$962.00	$955.00	
			1/4 oz	$496.00	$490.00	
			1/10 oz	$217.00	$211.50	
			4 coins	$3,520.00	$3,510.00	
$1,650.00	to	$1,749.99	1 oz	$1,992.00	$1,985.00	$2,030.00
			1/2 oz	$1,012.00	$1,005.00	
			1/4 oz	$521.00	$515.00	
			1/10 oz	$227.00	$221.50	
			4 coins	$3,705.00	$3,695.00	
$1,750.00	to	$1,849.99	1 oz	$2,092.00	$2,085.00	$2,130.00
			1/2 oz	$1,062.00	$1,055.00	
			1/4 oz	$546.00	$540.00	
			1/10 oz	$237.00	$231.50	
			4 coins	$3,890.00	$3,880.00	
$1,850.00	to	$1,949.99	1 oz	$2,192.00	$2,185.00	$2,230.00
			1/2 oz	$1,112.00	$1,105.00	
			1/4 oz	$571.00	$565.00	
			1/10 oz	$247.00	$241.50	
			4 coins	$4,075.00	$4,065.00	
$1,950.00	to	$2,049.99	1 oz	$2,292.00	$2,285.00	$2,330.00
			1/2 oz	$1,162.00	$1,155.00	
			1/4 oz	$596.00	$590.00	
			1/10 oz	$257.00	$251.50	
			4 coins	$4,260.00	$4,250.00	
$2,050.00	to	$2,149.99	1 oz	$2,392.00	$2,385.00	$2,430.00
			1/2 oz	$1,212.00	$1,205.00	
			1/4 oz	$621.00	$615.00	
			1/10 oz	$267.00	$261.50	
			4 coins	$4,445.00	$4,435.00	

Note 2: The price of each platinum product consists of the following components: cost of metal, cost to manufacture (including overhead) and margin. This price schedule is based upon a spot price of platinum at $1400.00 per FTO. At this spot price, the respective approximate average ranges for each component as a percentage of total price are as follows: cost of metal 71%-74%, cost to manufacture (including overhead) 11% - 14%, and margin 13%.

Dated: November 25, 2009.

Andrew Brunhart,

Deputy Director.

[FR Doc. E9–28771 Filed 12–3–09; 8:45 am]

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December 4, 2009

Part II

Securities and Exchange Commission

17 CFR Parts 240, 243, and 249b

Amendments to Rules for Nationally Recognized Statistical Rating Organizations; Proposed Rules for Nationally Recognized Statistical Rating Organizations; Final Rule and Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 243

[Release No. 34–61050; File No. S7–04–09]

RIN 3235–AK14

Amendments to Rules for Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Final rules.

SUMMARY: The Commission is adopting rule amendments that impose additional disclosure and conflict of interest requirements on nationally recognized statistical rating organizations (''NRSROs'') in order to address concerns about the integrity of the credit rating procedures and methodologies at NRSROs.

DATES: *Effective Date:* February 1, 2010.

Compliance Date: June 2, 2010.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Deputy Associate Director, at (202) 551–5521; Randall W. Roy, Assistant Director, at (202) 551–5522; Joseph I. Levinson, Special Counsel, at (202) 551–5598; Rebekah E. Goshorn, Attorney, at (202) 551–5514; Division of Trading and Markets, Securities and Exchange Commission; 100 F Street, NE., Washington, DC 20549–7010 or, with respect to questions involving the amendments to Regulation FD, Eduardo Aleman, Special Counsel, at (202) 551–3646; Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION:

I. Background

A. Prior Commission Actions

On June 16, 2008, the Commission, in the first of three related actions, proposed a series of amendments to its existing rules governing the conduct of NRSROs under the Securities Exchange Act of 1934 (''Exchange Act'') as well as a new rule mandating additional requirements for NRSROs.[1] The proposed amendments in the *June 2008 Proposing Release* were designed to further the purposes of the Credit Rating Agency Reform Act of 2006 (''Rating Agency Act'') to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.[2] More particularly, they were designed to enhance the transparency and objectivity of the NRSRO credit rating process generally and in particular with respect to rating structured finance products,[3] to increase competition among NRSROs, and to make it easier for market participants to assess the credit ratings performance of NRSROs. For example, the amendments, as proposed, would have required NRSROs to make additional public disclosures about their methodologies for determining structured finance ratings, publicly disclose the histories of their ratings, and make additional internal records and furnish additional information to the Commission in order to assist staff examinations of NRSROs. The proposals also would have prohibited NRSROs and their analysts from engaging in certain activities that could impair their objectivity, such as recommending how to obtain a desired rating and then rating the resulting security.

On February 2, 2009, the Commission adopted, with revisions, a majority of the rule amendments proposed in the *June 2008 Proposing Release.*[4] Concurrently with the adoption of those final rule amendments, the Commission proposed additional amendments to paragraph (d) of Rule 17g–2 with respect to the disclosure of ratings histories. The Commission also re-proposed with substantial modifications amendments to paragraphs (a) and (b) of Rule 17g–5, a new paragraph (e) to Rule 17g–5, and a conforming amendment to Regulation FD.[5]

Today, the Commission is adopting, with revisions, the rule amendments proposed in the *February 2009 Proposing Release.*

B. Summary of the Comments and Final Rules

In enacting the Rating Agency Act, which provides the Commission with the authority to establish a registration and oversight program for NRSROs, Congress cited as its purpose ''to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating agency industry.'' [6] The Commission seeks to further the purposes of Congress in enacting the Rating Agency Act. The rule amendments being adopted today are designed to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating agency industry. In the *June 2008 Proposing Release,* the Commission cited concerns about the integrity of NRSROs' credit rating procedures and methodologies in light of the role they played in the credit market turmoil.[7] As discussed throughout this release, the amendments being adopted today continue the Commission's process of addressing concerns about the integrity of the credit rating procedures and methodologies at NRSROs. The amendments incorporate most aspects

[1] *See Proposed Rules for Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008) (''*June 2008 Proposing Release''*). The Commission adopted the initial set of NRSRO rules in June 2007. *See Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007) (''*June 2007 Adopting Release''*). The second action taken by the Commission (also on June 16, 2008) was to propose a new rule that would require NRSROs to distinguish their ratings for structured finance products from other classes of credit ratings by publishing a report with the rating or using a different rating symbol. *See June 2008 Proposing Release.* The third action taken by the Commission was to propose a series of amendments to rules under the Exchange Act, the Securities Act of 1933 (''Securities Act''), the Investment Company Act of 1940 (''Investment Company Act''), and the Investment Advisers Act of 1940 that would eliminate references to NRSRO credit ratings in certain rules. *See References to Ratings of Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 58070 (July 1, 2008), 73 FR 40088 (July 11, 2008); *Securities Ratings,* Securities Act Release No. 8940 (July 1, 2008), 73 FR 40106 (July 11, 2008); *References to Ratings of Nationally Recognized Statistical Rating Organizations,* Investment Company Act Release No. 28327 (July 1, 2008), 73 FR 40124 (July 11, 2008).

[2] *See Credit Rating Agency Reform Act of 2006,* Pub. L. No. 109–291; *Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 3850, Credit Rating Agency Reform Act of 2006,* S. Report No. 109–326, 109th Cong., 2d Sess. (Sept. 6, 2006) (''Senate Report''), p. 2.

[3] The term ''structured finance product'' as used throughout this release refers broadly to any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This broad category of financial instrument includes, but is not limited to, asset-backed securities such as residential mortgage-backed securities (''RMBS'') and to other types of structured debt instruments such as collateralized debt obligations (''CDOs''), including synthetic and hybrid CDOs, or collateralized loan obligations (''CLOs'').

[4] *See Amendments to Rules for Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 59342 (February 2, 2009), 74 FR 6456 (February 9, 2009) (''*February 2009 Adopting Release''*).

[5] *See Re-proposed Rules for Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 59343 (February 2, 2009), 74 FR 6485 (February 9, 2009) (''*February 2009 Proposing Release''*).

[6] *See Senate Report* p. 2; *Rating Agency Act* § 2 (Finding 5).

[7] *See June 2008 Proposing Release,* 73 FR at 36213–36218.

of the proposed and re-proposed amendments but include several revisions based on the comments received.

The Commission received letters from 31 commenters [8] on the proposed and re-proposed amendments set forth in the *February 2009 Proposing Release*.[9] Several commenters expressed general support for the proposed measures and the goals they were designed to achieve.[10] Commenters expressed support, for example, for the Commission's efforts to increase transparency [11] and foster competition within the credit ratings industry.[12] Other commenters, however, expressed concerns about the potential negative effects of the proposed and re-proposed rule amendments.[13] Those comments included concerns that action more vigorous than that proposed by the Commission was needed to improve the quality of credit ratings [14] and to facilitate investors' independent analysis of the products underlying such ratings,[15] as well as the concern that increased competition would not necessarily increase the quality of credit ratings.[16]

The Commission notes that in addition to citing fostering competition in the credit rating industry as one of the purposes of the Rating Agency Act, Congress stated its finding in the Rating Agency Act that ''additional competition [among credit rating agencies] is in the public interest.'' [17] In seeking to increase competition, the Commission seeks to further the purposes of Congress in enacting the Rating Agency Act.

In summary, the Commission is adopting amendments to paragraph (d) of Rule 17g–2 and paragraphs (a) and (b) of Rule 17g–5 as well as a new paragraph (e) of Rule 17g–5 and a conforming amendment to Regulation FD.[18] The amendments to paragraph (d) of Rule 17g–2 require a broader disclosure of credit ratings history information. Specifically, as adopted in the *February 2009 Adopting Release,* paragraph (d) of Rule 17g–2 requires the disclosure of ratings actions histories, in eXtensible Business Reporting Language (''XBRL'') format, for 10% of the ratings in each class for which the NRSRO has registered and for which it has issued 500 or more credit ratings paid for by the issuer, underwriter, or sponsor of the security being rated (''issuer-paid'' credit ratings), with each required disclosure of a new ratings action to be made no later than six months after the ratings action is taken (hereinafter sometimes referred to as the ''10% requirement'').[19] The amendments being

[8] On April 15, 2009, the Commission held a Roundtable to Examine Oversight of Credit Rating Agencies (''Roundtable''). A number of the letters and statements submitted in connection with the Roundtable commented on the proposed rule amendments contained in the *February 2009 Proposing Release* and are discussed herein. All comments submitted in connection with the Roundtable are available on the Commission's Internet Web site, located at: *http://www.sec.gov/comments/s7-04-09/s70409.shtml* and in the Commission's Public Reference Room in its Washington, DC headquarters.

[9] Letter dated February 26, 2009 from Mike Marchywka (''Marchywka Letter''); letter dated March 5, 2009 from Shawn S. Fahrer, Student, CUNY (''Fahrer Letter''); letter dated March 8, 2009 from Russell D. Sears (''Sears Letter''); letter dated March 18, 2009 from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. (''JCR Letter''); letter dated March 25, 2009 from Laurel N. Leitner, Analyst, Council of Institutional Investors (''Council Letter''); letter dated March 25, 2009 from Mary Keogh, Managing Director, Regulatory Affairs and Daniel Curry, President, DBRS, Inc. (''DBRS Letter''); letter dated March 25, 2009 from Richard Whiting, Executive Director and General Counsel, Financial Services Roundtable (''FSR Letter''); letter dated March 25, 2009 from Charles D. Brown, General Counsel, Fitch Ratings (''Fitch Letter''); letter dated March 26, 2009 from Gregory W. Smith, General Counsel, Colorado Public Employees' Retirement Association (''Colorado PERA Letter''); letter dated March 26, 2009 from Douglas Adamson, Executive Vice President, American Bankers Association (''ABA Letter''); letter dated March 26, 2009 from George Miller, Executive Director and Sean C. Davy, Managing Director, American Securitization Forum and Securities Industry and Financial Markets Association (''ASF/SIFMA Letter''); letter dated March 26, 2009 from Karrie McMillan, General Counsel, Investment Company Institute (''ICI Letter''); Letter dated March 26, 2009 from John P. Hunt, Acting Professor of Law, University of California, Davis (''Hunt Letter''); letter dated March 26, 2009 from Cate Long, Multiple-Markets (''Multiple-Markets Letter''); letter dated March 26, 2009 from Hidetaka Tanaka, Senior Executive Managing Director, Rating and Investment Information, Inc. (''R&I Letter''); letter dated March 27, 2009 from Vickie A. Tillman, Executive Vice President, Standard and Poor's Investment Ratings Services (''S&P Letter''); letter dated March 28, 2009 from Michel Madelain, Chief Operating Officer, Moody's Investor Service, Moody's (''Moody's Letter''); letter dated March 31, 2009 from Robert G. Dobilas, CEO and President, Realpoint, LLC. (''Realpoint Letter''); letter dated April 2, 2009 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association Section of Business Law (''ABA Committee Letter'') (representing views of the Committee, not the American Bar Association); letter dated April 3, 2009 from Dottie Cunningham, CEO, Commercial Mortgage Securities Association (''CMSA Letter''); letter dated May 19, 2009 from Lawrence A. Pingree, SiliconValleyForex.com (''Pingree Letter''); statement by Gregory W. Smith, General Counsel, Colorado Public Employees' Corporation, submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''Colorado PERA Statement''); statement by Deborah A. Cunningham, Executive Vice President, Chief Investment Officer, Federated Investors, Inc., submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''Federated Statement''); statement by Glenn Reynolds, CEO, CreditSights, Inc., submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''CreditSights Statement''); statement by Alex J. Pollock, Resident Fellow, American Enterprise Institute, submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''AEI Statement''); statement by Raymond W. McDaniel, CEO and President, Moody's Investor Service submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''Moody's Statement''); statement by Robert G. Dobilas, President and CEO, Realpoint, Inc., submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''Realpoint Statement''); statement by Ethan Berman, RiskMetrics Group, submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''RiskMetrics Statement''); statement by Daniel Curry, President, DBRS Inc., submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''DBRS Inc. Statement''); statement by Paul Schott Stevens, President and CEO, Investment Company Institute, submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''ICI Statement''); statement by Sean Egan, Co-Founder and Managing Director, Egan-Jones Rating Co., submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''Egan-Jones Statement''); statement by James A. Kaitz, President and CEO, Association for Financial Professionals, submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''AFP Statement''); statement by George P. Miller, Executive Director, American Securitization Forum, submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''ASF Statement''); statement by James H. Gellert, President and CEO, and Dr. Patrick James Caragata, Founder and Executive Vice Chairman, Rapid Ratings International, Inc., submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''Rapid Ratings Statement''); statement by Richard H. Baker, Managed Funds Associates, submitted for U.S. Securities and Exchange Commission Roundtable to Examine Oversight of Credit Rating Agencies (April 15, 2009) (''MFA Statement''); letter dated June 1, 2009 from Christine DiFabio, Vice President, Advocacy and Accounting Policy, Financial Executives International (''FEI Letter''); letter dated June 12, 2009 from Curtis C. Verschoor, L Q Research Professor, School of Accountancy, DePaul University (''Verschoor Letter''). These comments are available on the Commission's Internet Web site, located at *http://www.sec.gov/comments/s7-04-09/s70409.shtml* and in the Commission's Public Reference Room in its Washington, DC headquarters.

[10] *See, e.g.,* Marchywka Letter; Council Letter; Colorado PERA Letter; R&I Letter; ABA Committee Letter; Pingree Letter; Realpoint Statement; FEI Letter.

[11] *See* ABA Committee Letter; Pingree Letter; Realpoint Statement.

[12] *See* Colorado PERA Letter.

[13] *See, e.g.,* Fahrer Letter; DBRS Letter; ICI Letter; Hunt Letter; Moody's Letter; DBRS Statement; Verschoor Letter.

[14] *See* Hunt Letter.

[15] *See* ICI Letter.

[16] *See* Fahrer Letter; Hunt Letter.

[17] *See Rating Agency Act § 2.*

[18] 17 CFR 243.100, 243.101, 243.102 and 243.103.

[19] *See February 2009 Adopting Release,* 74 FR at 6460–6462. As discussed in greater detail below, due to the fact that the Commission has not yet

Continued

adopted today add the requirement that an NRSRO disclose ratings action histories for all credit ratings initially determined on or after June 26, 2007 in an interactive data file that uses a machine-readable format (hereinafter sometimes referred to as the ''100% requirement''). In the case of issuer-paid credit ratings, each new ratings action will be required to be reflected in such publicly disclosed histories no later than twelve months after it is taken, while in the case of ratings actions that are not issuer-paid, each new ratings action will be required to be reflected no later than twenty-four months after it is taken.[20] An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in the XBRL format using the Commission's List of XBRL Tags for NRSROs. This new disclosure requirement applies to all NRSRO credit ratings regardless of the business model under which they are determined. Consequently, the new requirement applies to all types of credit ratings regardless of whether they are issuer-paid credit ratings, credit ratings made available only to subscribers (''subscriber-paid'' credit ratings), or credit ratings generated on an unsolicited basis and made publicly available (''unsolicited'' credit ratings).

The amendments to paragraphs (a) and (b) of Rule 17g–5 being adopted today, substantially as proposed in the *February 2009 Proposing Release,* require an NRSRO that is hired by issuers, sponsors, or underwriters (hereinafter collectively ''arrangers'') to determine an initial credit rating for a structured finance product to (1) disclose to non-hired NRSROs that have furnished the Commission with the certification described below that the arranger is in the process of determining such a credit rating and (2) to obtain representations from the arranger that the arranger will provide information given to the hired NRSRO to the non-hired NRSROs that have furnished the Commission with the certification described below.[21] In addition, the new paragraph (e) of Rule 17g–5 being adopted today, as proposed in the *February 2009 Proposing Release,* requires an NRSRO seeking to access information provided by an arranger to a hired NRSRO and made available to other NRSROs pursuant to the amended rule to furnish the Commission with an annual certification that the NRSRO is accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using that information.[22] Finally, the amendment to Rule 100(b)(2)(iii) of Regulation FD being adopted today, substantially as proposed in the *February 2009 Proposing Release,* accommodates the new disclosure requirements under Rule 17g–5 by permitting the disclosure of material non-public information to an NRSRO regardless of whether the NRSRO makes its ratings publicly available.[23]

In order to allow NRSROs sufficient time to implement the new disclosure requirements, the compliance date of the amendments is delayed until 180 days after publication in the **Federal Register**. The Commission notes that it used the same time period for compliance with the 10% disclosure requirement pursuant to Rule 17g–2.[24] While certain NRSROs already are complying with the 10% disclosure requirement, the Commission notes that the 100% disclosure requirements being adopted are an expansion of the current 10% disclosure requirements for issuer-paid credit ratings and for the first time will require all NRSROs to disclose ratings history. Therefore, with respect to the requirements under Rule 17g–5, the Commission believes the compliance date is appropriate in order to allow the NRSROs and arrangers sufficient time to implement the new disclosure requirements.

II. Final Amendments to Rule 17g–2

A. Summary and Background

Rule 17g–2 requires an NRSRO to make and retain certain records relating to its business and to retain certain other records made in the normal course of business operations. The rule also prescribes the time periods and manner in which these records are required to be retained and, as described below, requires certain of those records regarding ratings histories to be publicly disclosed.[25] The Commission is adopting today additional amendments to paragraph (d) of Rule 17g–2 to enhance the requirements in the rule to publicly disclose these records of credit rating histories for the purpose of providing users of credit ratings, investors, and other market participants and observers the raw data with which to compare the credit ratings performance of NRSROs by showing how different NRSROs initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments.

Paragraph (a)(8) to Rule 17g–2 requires an NRSRO to make and retain, as part of its internal records that are available to Commission staff, a record of the ratings history of each outstanding credit rating it maintains showing all rating actions (initial rating, upgrades, downgrades, placements on watch for upgrade or downgrade, and withdrawals) and the date of such actions identified by the name of the security or obligor rated and, if applicable, the CUSIP for the rated security or the Central Index Key (CIK) number for the rated obligor.[26] Paragraph (d) of Rule 17g–2 requires an NRSRO to make publicly available in an XBRL format ratings action histories for 10% of the outstanding issuer-paid credit ratings required to be retained pursuant to paragraph (a)(8), selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more issuer-paid credit ratings, with each required disclosure of a new ratings action to be made no later than six months after the ratings action is taken.[27] Exhibit 1 of Form NRSRO requires an NRSRO subject to the public disclosure requirements of Rule 17g–2(d) to indicate in the exhibit the Web address where the XBRL Interactive Data File with the required information can be accessed.[28]

While paragraph (a)(8) of Rule 17g–2 and the amendments to Exhibit 1 were adopted in the *February 2009 Adopting Release* substantially as proposed, paragraph (d) of Rule 17g–2, as adopted, reflected modifications from the originally proposed amendment. Specifically, as proposed, the rule would have required an NRSRO to make ratings actions histories publicly available on its corporate Web site in XBRL format for 100% of outstanding credit ratings six months after the date of the rating action, regardless of whether the credit ratings were issuer-

published the List of XBRL Tags for NRSROs on its Internet Web site, on August 5, 2009, the Commission provided notice that an NRSRO subject to those disclosure provisions can satisfy the requirement to make publicly available ratings history information in an XBRL format by using an XBRL format or any other machine-readable format, until such time as the Commission provides further notice. *See infra,* note 99 and accompanying text.

[20] *See* 17 CFR 240.17g–2(d).

[21] *See* 17 CFR 240.17g–5(a)(3) and (b)(9).

[22] *See* 17 CFR 240.17g–5(e).

[23] *See* 17 CFR 243.100(b)(2)(iii).

[24] *See February 2009 Adopting Release,* 74 FR at 6461.

[25] *See* 17 CFR 240.17g–2.

[26] *See February 2009 Adopting Release;* 17 CFR 240.17g–2(a)(8).

[27] *See February 2009 Adopting Release;* 17 CFR 240.17g–2(d).

[28] *See February 2009 Adopting Release;* Instructions to Form NRSRO.

paid, subscriber-paid, or unsolicited.[29] The rule as adopted, however, limited this required ratings history disclosure to 10% of the outstanding issuer-paid credit ratings required to be retained pursuant to paragraph (a)(8) of Rule 17g–2 for each class of credit rating for which the NRSRO is registered and for which it has issued 500 or more issuer-paid credit ratings, with each required disclosure of a new ratings action to be disclosed no later than six months after the ratings action is taken.[30]

In the *February 2009 Proposing Release,* the Commission stated that the amendments to paragraph (d) of Rule 17g–2 adopted in the *February 2009 Adopting Release* would provide users of credit ratings with information to begin assessing the performance of NRSROs subject to the rule.[31] The Commission also stated in the *February 2009 Proposing Release* that it continued to believe that the proposed amendments to paragraph (d) of Rule 17g–2 set forth in the *June 2008 Proposing Release,* which would have required public disclosure of ratings action histories for all outstanding credit ratings, could provide substantial benefits to users of credit ratings.[32] However, the Commission wanted to solicit further comment on the proposed amendments to the rule in order to gain a better understanding of how they would impact NRSROs operating under the issuer-paid and subscriber-paid business models.[33]

Consequently, the Commission re-proposed amendments to paragraph (d) that would require disclosure of ratings histories for 100% of the issuer-paid credit ratings outstanding. In addition, the Commission asked a series of detailed questions to elicit information about how the rule proposal would impact issuer-paid NRSROs and whether the rule should be expanded to apply to all credit ratings: issuer-paid, subscriber-paid, and unsolicited.[34]

The amendments proposed in the *February 2009 Proposing Release* would have created three new subparagraphs to paragraph (d) of Rule 17g–2: (d)(1), (d)(2), and (d)(3). Paragraphs (d)(1) and (d)(2) would have contained the text of paragraph (d) as adopted in the *February 2009 Adopting Release.* Specifically, paragraph (d)(1) would have contained the record retention requirements of paragraph (d) as originally adopted by the Commission in the *June 2007 Adopting Release.*[35] Paragraph (d)(2) would have contained the 10% ratings history disclosure requirements adopted by the Commission in the *February 2009 Adopting Release.*[36] Finally, paragraph (d)(3) would have contained the new requirement that NRSROs disclose, in XBRL format, ratings history information for 100% of their outstanding issuer-paid credit ratings initially determined on or after June 26, 2007 (the effective date of the Rating Agency Act). Under the proposed amendment, a credit rating action would not have needed to be disclosed until twelve months after the action was taken.[37]

The Commission received responses from twenty-three commenters addressing various aspects of the proposed amendments to paragraph (d) of Rule 17g–2 and responding to some of the questions posed by the Commission.[38] A substantial number of commenters expressed general support for expanding the public disclosure requirements for ratings history information.[39] One NRSRO, for example, stated that the proposed amendment ''balances the need for adequate disclosure of historical information with the legitimate commercial concerns of the NRSROs.''[40] Some commenters, however, expressed general opposition to the proposed amendments.[41] Two NRSROs, for example, questioned the Commission's authority to adopt the proposed disclosure requirements, contending that the amendments were not ''narrowly tailored'' and expressing concern over the potential impact the proposed requirements would have on their intellectual property interests and rights in their ratings data.[42] As discussed below, the Commission is adopting the amendments to paragraph (d) of Rule 17g–2 under its authority to require NRSROs to make and keep for specified periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[43] In addition, the amendments as adopted are intended to further the goals of the Rating Agency Act, fostering competition, transparency, and accountability in the credit rating industry, by striking an appropriate balance between providing users of credit ratings, investors, and other market participants and observers with a sufficient volume of raw data with which to gauge the accuracy of different NRSROs' ratings over time while at the same time addressing concerns raised by NRSROs regarding their ability to derive revenue from granting market participants access to their credit ratings and downloads of their credit ratings.

As discussed in detail below, the Commission is adopting paragraphs (d)(1) and (d)(2) substantially as proposed. However, in response to the comments received and to facilitate the ability of users of credit ratings to directly compare the ratings performance of all NRSROs, the Commission is expanding the ratings history disclosure requirement in new paragraph (d)(3) to include ratings history information for all NRSRO credit ratings initially determined on or after June 26, 2007 (the effective date of the Rating Agency Act), whether issuer-paid, subscriber-paid, or unsolicited. The amendment as adopted requires a ratings action on an issuer-paid credit rating to be publicly disclosed no later than twelve months after it is taken, as proposed in the *February 2009 Proposing Release.* For ratings actions taken on ratings that are not issuer-paid, however, the amendment as adopted allows a delay of twenty-four months between the time a credit rating action is taken and the time it must be disclosed. The Commission is structuring the amendment as adopted in this manner in order to address commenters' concerns regarding the potentially disproportionate negative effects such a disclosure requirement could have on NRSROs operating under the subscriber-paid business model in the absence of a sufficiently long delay

[29] *See June 2008 Proposing Release,* 73 FR at 36228–36230.

[30] 17 CFR 240.17g–2(d).

[31] *See February 2009 Proposing Release,* 74 FR at 6487–6488.

[32] *See February 2009 Proposing Release,* 74 FR at 6487–6488.

[33] *See February 2009 Proposing Release,* 74 FR at 6487–6490.

[34] *See February 2009 Proposing Release,* 74 FR at 6488–6490.

[35] *See June 2007 Adopting Release,* 72 FR at 33622; *see also* 17 CFR 240.17g–2(d).

[36] *See February 2009 Adopting Release,* 74 FR at 6460–6463.

[37] *See February 2009 Proposing Release,* 74 FR at 6487–6488.

[38] *See* JCR Letter; Council Letter; DBRS Letter; Fitch Letter; Colorado PERA Letter; ABA Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; Multiple-Markets Letter; R&I Letter; S&P Letter; Moody's Letter; Realpoint Letter; ABA Committee Letter; CMSA Letter; Colorado PERA Statement; Federated Statement; AEI Statement; Risk Metrics Statement; DBRS Statement; ICI Statement; AFP Statement; ASF Statement; Rapid Ratings Statement; MFA Statement.

[39] *See, e.g.,* Council Letter; Fitch Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; Multiple-Markets Letter; Colorado PERA Statement; Federated Statement; Risk Metrics Statement; AFP Statement; ASF Statement.

[40] *See* Fitch Letter.

[41] *See, e.g.,* DBRS Letter; R&I Letter; S&P Letter; Moody's Letter.

[42] *See* S&P Letter; Moody's Letter.

[43] *See* Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

between the time a ratings action is taken—and made available to paid subscribers—and the time that ratings action must be made public.

In addition, as discussed in detail below, the Commission has not yet published the List of XBRL Tags for NRSROs on its Internet Web site. Consequently, the Commission is clarifying in the rule text of new paragraph (d)(3) of Rule 17g–2 that an NRSRO can make the required ratings history data publicly available in any machine-readable format, including XBRL, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the List of XBRL Tags for NRSROs.

B. Paragraph (d)(1) of Rule 17g–2

As adopted, paragraph (d)(1) of Rule 17g–2 consists of the record retention requirements of paragraph (d) as originally adopted by the Commission in the *June 2007 Adopting Release.* These requirements mandate that an NRSRO maintain an original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of Rule 17g–2 in a manner that, for the applicable retention period specified in paragraph (c) of Rule 17g–2, makes the original record or copy easily accessible to the principal office of the NRSRO and to any other office that conducted activities causing the record to be made or received.[44] The purpose of these requirements is to facilitate Commission examination of the NRSRO and to avoid delays in obtaining the records during an on-site examination.

The Commission did not receive any comments on this proposal to codify the existing requirements of paragraph (d) as new paragraph (d)(1) and is adopting it as proposed.

C. Paragraph (d)(2) of Rule 17g–2

Paragraph (d)(2) of Rule 17g–2, as adopted, consists of the ratings history disclosure requirements adopted by the Commission in the *February 2009 Adopting Release* (*i.e.,* the 10% requirement). As noted above, this provision requires an NRSRO to make publicly available, in an XBRL format, ratings action histories for 10% of the outstanding issuer-paid credit ratings required to be retained pursuant to paragraph (a)(8) of Rule 17g–2, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more issuer-paid credit ratings, with each required disclosure of a new ratings action to be made no later than six months after the ratings action is taken. Several commenters raised questions about whether it was appropriate or necessary to have both a 10% requirement and a 100% requirement. In particular, two commenters stated that the proposed 100% disclosure requirement of paragraph (d)(3) to Rule 17g–2 would be duplicative of the existing 10% disclosure requirement for issuer-paid ratings in new paragraph (d)(2).[45] In addition, both of those commenters as well as a third suggested that the Commission consider the results of the 10% disclosure requirement before adopting the proposed 100% disclosure.[46] These three commenters also argued that in light of the existing 10% disclosure requirement, the amendment as proposed, including the 100% disclosure requirement, was not narrowly tailored.[47] One commenter noted that the Commission has not allowed any time to pass to be able to judge whether the existing 10% disclosure requirement will operate effectively to facilitate comparisons of the aggregate performance of issuer-paid ratings.[48] Another commenter suggested extending the 10% requirement in paragraph (d)(2) of Rule 17g–2 to all NRSROs first before adopting the 100% disclosure requirement.[49] A third commenter stated that the Commission should withdraw the 10% disclosure obligation altogether if it should decide to adopt the 100% requirement.[50]

The Commission notes that the 10% requirement and 100% requirement will provide different types of data sets with which to analyze and compare the performance of NRSROs' credit ratings. For example, the 10% requirement applies to all outstanding and future credit ratings that fall within the rule's scope (*i.e.,* an NRSRO is required to draw its random selection of a 10% sample from its entire pool of issuer-paid credit ratings, regardless of when the obligor or instrument was initially rated) whereas the 100% requirement is limited to outstanding credit ratings initially determined on or after June 26, 2007. Therefore, initially, the 10% requirement will provide ratings history information that is much more retrospective and will include ratings histories for credit ratings that have been outstanding for much longer periods of time. In addition, ratings actions subject to the 10% disclosure requirement must be disclosed more promptly (within six months) than ratings actions subject to the 100% requirement. The data generated by the 10% requirement will involve a longer time series of information and, therefore, is designed to aid statistical research on credit ratings performance.

The 100% ratings history disclosure requirement will result in a different data set. It will be broader in scope but more limited in time, applying only to credit ratings initially determined on or after June 26, 2007. The 100% disclosure requirement also allows for a longer delay between the time a ratings action is taken and the time it must be disclosed—twelve months for ratings actions on issuer-paid credit ratings and twenty-four months for ratings actions on ratings not issuer-paid—as opposed to the six month delay allowed under the 10% disclosure requirement. The 100% ratings disclosure will provide for a more granular comparison of the performance of an NRSRO's credit ratings. In particular, it will require ratings history disclosure for every outstanding credit rating of each NRSRO. This will permit users of credit ratings and others to take a specific debt instrument and compare the ratings history for the instrument of each NRSRO that rated it. Thus, whereas the 10% requirement will be limited to analyses using a statistical sampling, the 100% requirement will facilitate analyses of how the NRSROs each rated a specific obligor, security, or money market instrument. In addition, as discussed further below, whereas the 10% requirement is limited to issuer-paid credit ratings, the 100% requirement covers all credit ratings regardless of the business model under which they are issued, thereby allowing comparisons across and among a broader set of NRSROs. Thus, the comprehensive disclosure of ratings histories for all outstanding credit ratings will facilitate a more fundamental ratings-by-ratings comparisons across NRSROs, and will also generate data that can be used to develop independent statistical analyses of the overall performance of an NRSRO's credit ratings in total and within classes and subclasses of credit ratings (e.g., within product or industry types). This will provide users of credit ratings with more ways to analyze the performance of the NRSROs' credit ratings. The increased ability to

[44] *See June 2007 Adopting Release,* 72 FR at 33622.

[45] *See* DBRS Letter; S&P Letter.

[46] *See* DBRS Letter; Moody's Letter; S&P Letter.

[47] *See* DBRS Letter; Moody's Letter; S&P Letter.

[48] *See* Moody's Letter.

[49] *See* DBRS Letter.

[50] *See* S&P Letter.

understand how an NRSRO's credit ratings perform will further the goals of the Rating Agency Act to foster accountability, transparency, and competition in the credit rating industry.[51]

Furthermore, the Commission notes that while the 100% requirement will be useful to market participants and observers within a short period of the rule being effective (the vast majority will be available at twelve months) for the purposes of comparing the performance of different NRSROs rating the same obligors or instruments, due to the June 26, 2007 cutoff date and the longer grace periods, it will take time for the new 100% disclosure requirement to generate the comprehensive data pool necessary for thorough independent analysis and comparison of the long-term ratings performance of the NRSROs. In the meantime, the 10% requirement will provide ratings performance information on issuer-paid credit ratings (the vast majority of outstanding NRSRO credit ratings). Thus, in addition to the other benefits of retaining the 10% requirement, the ratings performance and information it provides will help bridge the gap until the 100% requirement has generated a robust set of data.[52]

In light of the different structures of the two ratings history disclosure requirements as well as the different data sets which they will provide, and the corresponding complimentary ways in which they will advance the goals of the Rating Agency Act and the Commission's rules, the Commission believes that it would be beneficial to retain the 10% ratings history disclosure requirement alongside the new 100% disclosure requirement being adopted today.

Accordingly, the Commission is adopting new paragraph (d)(2) to Rule 17g–2 as proposed.

D. Paragraph (d)(3) of Rule 17g–2

As adopted, new paragraph (d)(3) to Rule 17g–2 requires each NRSRO to disclose ratings history information for 100% of its credit ratings initially determined on or after June 26, 2007, with each ratings action to be disclosed no later than twelve months or twenty-four months after it is taken, depending on whether the rating is issuer-paid. Any ratings action information required under the 100% disclosure requirement with respect to issuer-paid credit ratings need not be made public less than twelve months from the date such ratings action is taken. A ratings action on a rating that is not issuer-paid need not be made public less than twenty-four months from the date it is taken. As noted above, this represents a modification of the proposed amendment, which would have applied the 100% disclosure requirement only to issuer-paid ratings with a twelve month grace period. The Commission requested comments on a number of specific questions pertaining to this provision of the proposed amendment, and the modifications are designed to address the comments received in response to those questions.

The Commission specifically requested comment on whether the proposed 100% disclosure requirement should apply equally to issuer-paid and subscriber-paid credit ratings.[53] The Commission received letters from seventeen commenters in response to this inquiry,[54] with twelve of those commenters answering in the affirmative.[55] Several commenters argued that excluding subscriber-paid credit ratings from the proposed disclosure requirements would be inconsistent with the Commission's goals in proposing the amendment—enhancing NRSRO accountability, transparency, and competition.[56] In addition, several commenters stated that limiting the disclosure requirement to issuer-paid ratings would deprive users of the ability to assess the accuracy and integrity of subscriber-paid credit ratings.[57] Two commenters argued that limiting the rule to issuer-paid credit ratings would result in a lack of uniformity in regulatory approach and create a lack of transparency for subscriber-paid credit ratings, and therefore would not be in the best interests of investors or the capital markets.[58] One commenter in favor of expanding the disclosure requirement to include subscriber-paid credit ratings suggested allowing a longer posting delay for subscriber-paid ratings actions than for issuer-paid credit ratings.[59]

Five commenters argued that the rule should not apply to subscriber-paid credit ratings.[60] Concerns expressed by these commenters included a higher likelihood of substantial financial harm to subscriber-paid NRSROs that would arise from the required disclosures[61] and the threat of overly burdensome and costly requirements.[62] One commenter, arguing that ''Subscriber-Paid competition introduces credibility back into the ratings business,'' warned that the Commission should be ''careful not to, in the interest of being overly fair * * * quash the very solutions to the problems so plaguing the industry.''[63]

The Commission also asked whether the rule should apply to unsolicited credit ratings.[64] The Commission received letters from nine commenters in response to this inquiry,[65] with seven responding generally in the affirmative.[66] One commenter noted that any distinction between solicited and unsolicited ratings would stigmatize unsolicited ratings and undercut the ability to foster competition,[67] while others noted that the disclosure of unsolicited ratings provides a point of comparison facilitating efforts to identify those NRSROs with conflicts of interests.[68] In contrast, one commenter stated that requiring unsolicited NRSROs to publish their ratings would ''put them out of business.''[69]

The Commission believes the rule should apply to all types of credit ratings, whether issuer-paid, subscriber-paid, or unsolicited. The intent of the rule is to facilitate comparisons of credit rating accuracy across all NRSROs—including direct comparisons of different NRSROs' treatment of the same obligor or instrument—in order to enhance NRSRO accountability,

[51] *See Credit Rating Agency Reform Act of 2006,* Pub. L. No. 109–291; Senate Report, p. 2.

[52] According to Form NRSRO submissions by the NRSROs, issuer-paid credit ratings account for over 98% of the current credit ratings issued by NRSROs.

[53] *February 2009 Proposing Release,* 74 FR at 6489

[54] *See* Council Letter; DBRS Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; Multiple-Markets Letter; S&P Letter; Moody's Letter; Realpoint Letter; ABA Committee Letter; Colorado PERA Statement; AEI Statement; RiskMetrics Statement; DBRS Statement; ICI Statement; AFP Statement; Rapid Ratings Statement; MFA Statement.

[55] *See* Council Letter; DBRS Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; Multiple-Markets Letter; S&P Letter; Moody's Letter; Colorado PERA Statement; RiskMetrics Statement; DBRS Statement; ICI Statement; AFP Statement; MFA Statement.

[56] *See, e.g.,* Council Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; S&P Letter; Moody's Letter; ICI Statement.

[57] *See, e.g.,* Council Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; Moody's Letter; Colorado PERA Statement; MFA Statement.

[58] *See* DBRS Statement; Moody's Letter.

[59] *See* Multiple-Markets Letter.

[60] *See* Hunt Letter; Realpoint Letter; ABA Committee Letter; AEI Statement; Rapid Ratings Statement.

[61] *See e.g.,* Hunt Letter; Realpoint Letter.

[62] *See e.g.,* Realpoint Letter; Rapid Ratings Statement.

[63] Rapid Ratings Statement.

[64] *See February 2009 Proposing Release,* 74 FR at 6490.

[65] *See* Council Letter; DBRS Letter; Fitch Letter; Colorado PERA Letter ASF/SIFMA Letter; Hunt Letter; Multiple-Markets Letter; Realpoint Letter; ABA Committee Letter.

[66] *See* Council Letter; DBRS Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; Hunt Letter; ABA Committee Letter.

[67] *See* Fitch Letter.

[68] *See e.g.,* Council Letter; Colorado PERA Letter.

[69] *See* Realpoint Letter.

transparency, and competition. Excluding certain types of credit ratings issued by NRSROs from the rule's scope could undermine this goal, particularly where the exclusion effectively would remove an NRSRO entirely from the rule's scope because that NRSRO issues only the types of credit ratings not covered by the rule. Ratings history information for outstanding credit ratings is the most direct means of comparing the performance of two or more NRSROs. It allows an investor or other user of credit ratings to compare how all NRSROs that maintain a credit rating for a particular obligor or instrument initially rated that obligor or instrument and, thereafter, how and when they adjusted their credit rating over time. This will allow the person reviewing the credit rating histories of the NRSROs to reach conclusions about which NRSROs did the best job in determining an initial rating and, thereafter, making appropriate and timely adjustments to the credit rating.

For example, if three hypothetical NRSROs—X Credit Ratings Company, Y Credit Ratings Company, and Z Credit Ratings Company—each rated a hypothetical ABC Security, the 100% requirement would allow an investor to directly compare the ratings performance of those three NRSROs for that security. To illustrate, assume that when ABC Security was issued in August 2007, X Credit Ratings Company and Y Credit Ratings Company initially gave it their highest rating of 'AAA,' while Z Credit Ratings Company initially rated it as 'A.' Assume further that in March 2008, X Credit Ratings Company downgraded ABC Security to 'AA,' followed by a June 2008 downgrade to 'A,' while Y Credit Ratings Company maintained its 'AAA' rating for ABC Security until August 2008, at which point it downgraded it to 'A.' Assume also that Z Credit Ratings Company maintained its 'A' rating for ABC Security without change. Under the 100% disclosure requirement adopted today, an investor reviewing the ratings histories in August 2009 would be able to see that X Credit Ratings Company and Y Credit Rating Companies had, by August 2008, arrived at the same 'A' rating for ABC Security—but they will have taken significantly different paths to get to that rating:

	X Credit ratings company	Y Credit ratings company	Z Credit ratings company
August 2007	AAA	AAA	A
March 2008	AA	AAA	A
June 2008	A	AAA	A
August 2008	A	A	A

By examining the credit rating histories of the three hypothetical NRSROs for ABC Security, an investor will be able to perform an individual analysis of which NRSROs did the best job in determining an initial rating and in making appropriate and timely adjustments to the credit rating.

The Commission believes that the new disclosure requirements will foster greater accountability and transparency for ratings performance for NRSROs as well as competition among NRSROs by making it easier for persons to analyze the actual credit ratings performance of NRSROs in assessing creditworthiness, regardless of the business model under which an NRSRO operates. These disclosures may also enhance competition by making it easier for smaller and less established NRSROs to develop proven track records when determining credit ratings and for potential users of their ratings to evaluate the relative quality and performance of these NRSROs.

In addition to facilitating individual comparisons of NRSRO ratings performance, disclosure of ratings histories will allow market observers to generate statistics about NRSRO performance by compiling and processing the information in the aggregate. Currently, NRSROs are required to publicly disclose internally generated default and transition performance statistics in Exhibit 1 of Form NRSRO. The existing disclosure requirements of Exhibit 1, as amended in the *February 2009 Adopting Release,*[70] provide investors and other users of credit ratings with useful, standardized performance statistics with which to compare the performance of NRSROs. The raw data to be provided by NRSROs pursuant to the new ratings history disclosure requirements, however, will enable market participants to develop performance measurement statistics that would supplement those required to be published by the NRSROs themselves in Exhibit 1, tapping into the expertise of credit market observers and participants in order to create better and more useful means to compare the credit ratings performance of NRSROs. The ratings history disclosure requirements adopted today will facilitate the ability of individual users of credit ratings to design their own performance metrics to generate the performance statistics most meaningful to them. Users of credit ratings will benefit from the ability to generate performance statistics best suited to their individual needs.

As discussed above, the arguments raised by commenters for excluding particular types of credit ratings from the rule's scope focused largely on the potential that the disclosure requirement will result in undue costs to, or have a disproportionate negative impact on the revenues of, NRSROs that issue that type of credit rating.[71] For example, NRSROs that primarily determine subscriber-paid credit ratings argued that these ratings should not be subject to the rule because it will cause subscribers to stop paying them for access to current outstanding credit ratings.[72] NRSROs that primarily determine issuer-paid and unsolicited credit ratings argued that these ratings should not be subject to a 100% disclosure requirement because it would cause persons who pay for downloadable access to their current ratings to stop paying for the service.[73] They also argued that they derive separate revenue from selling access to historical information about their outstanding credit ratings.[74]

In the *February 2009 Proposing Release,* the Commission asked a series of detailed questions to elicit information about whether the rule would have the impacts described above. The intent was to provide interested persons with the chance to provide more detailed comments and supply supporting quantitative data if appropriate. Although, as noted above, commenters expressed concern over the potential costs, they did not provide

[70] *See February 2009 Adopting Release,* 74 FR at 6457–6459.

[71] *See e.g.,* Hunt Letter; Realpoint Letter.

[72] *See e.g.,* Realpoint Letter.

[73] *See e.g.,* JCR Letter; R&I Letter.

[74] *See e.g.,* Moody's Letter; S&P Letter.

quantitative data as requested by the Commission.

After careful review of the comments, the Commission believes that expanding the rule to include all types of credit ratings (*i.e.,* the ability to compare the performance of all NRSROs) will maximize its benefits to users of credit ratings. The Commission acknowledges commenters' concerns over potential loss of NRSRO revenue, and notes that an overall drop in subscription revenues across the credit rating industry could be a sign that the rule's requirement that NRSROs publicly disclose their credit ratings histories is having the unintended effect of causing users of credit ratings to cease purchasing access to current credit ratings or downloads of current credit ratings due to the availability of ratings histories disclosed on a delayed basis.

As discussed further below, however, it is the Commission's belief that increasing the grace period between the time a ratings action is taken on a rating issued that is not issuer-paid and the time it is required to be disclosed to twenty-four months will address these concerns and mitigate any potential negative impact on such NRSRO revenues. To the extent that users of credit ratings are paying subscription fees in significant part to obtain current ratings information, ratings that are twenty-four months old likely will not constitute a sufficient substitute for current ratings information such that existing subscribers would cease to pay such subscription fees for access to current ratings information. In addition, while several NRSROs whose ratings are issuer-paid also earn revenue from payments for downloads of their ratings, the Commission understands that this revenue is a relatively small percentage of their overall revenue. The Commission believes that the twelve month delay in publication will help mitigate any effect on these revenues for the 100% disclosure requirement. As with the credit ratings that are not issuer-paid, ratings that are twelve months old likely will not constitute a sufficient substitute for current ratings information such that existing customers would cease to pay fees for access to current ratings information. Furthermore, the amended rule, as adopted, does not require the disclosure of the analysis and report that typically accompany the publication of a credit rating. NRSROs will continue to be able to distribute such information as they see fit, including selling such information to subscribers, which should also serve to mitigate any potential loss of subscribers.

Nonetheless, the Commission intends to closely monitor the impact, if any, the new disclosure requirements of the rule, as amended, have on the revenues NRSROs obtain from users purchasing access to current credit ratings or downloads of current credit ratings. Depending on what, if anything, this monitoring reveals, the Commission may re-examine the rule and, if appropriate, consider modifications designed to address the concerns of harm to NRSRO revenue derived from selling current ratings information, balanced against the concerns expressed by other commenters regarding the usefulness of ratings history disclosure to investors when such disclosure does not include more recent (and perhaps more relevant) ratings. For example, the Commission's monitoring may reveal that users of credit ratings are ceasing to purchase access to current credit ratings or downloads of current credit ratings because of the public disclosure of the histories of those ratings. Alternatively, it may reveal that investors and other users of credit ratings are continuing to pay subscription fees for access to current ratings information, thus confirming that they do not view historical ratings as an adequate substitute for such current ratings. To complement the Commission's monitoring, the Commission encourages interested persons to notify the Commission of relevant developments under the new rules. For example, NRSROs should notify the Commission if they believe they are losing revenues because users of credit ratings view the twenty-four months delayed ratings action history disclosure as an adequate substitute for purchasing access to up-to-date credit ratings or downloads of up-to-date credit ratings.

The Commission notes, however, that the rule is intended to foster greater accountability and transparency of credit rating performance for NRSROs and to increase competition by allowing users of credit ratings to better assess and compare the performance of NRSROs, and other Commission rules are designed to reduce undue reliance on ratings by investors and other market participants. The increased accountability and transparency provided by the rule could cause users of credit ratings to shift their business from one NRSRO to another based on their views as to which entity provides the most accurate credit ratings. A loss of revenues by some NRSROs resulting in the gain of revenues by other NRSROs occasioned by a shift in business would not be a reason to consider modifying the rule as discussed above; indeed, it could be evidence that the rule is serving its intended purpose. A steep decrease in subscription revenues across the credit rating industry, however, could be the result of a number of factors, and the Commission would carefully examine such a decrease. Although a general decline in subscription revenue likely would reflect that investors and other market participants have less demand for ratings, such a decrease in demand would be expected if regulatory emphasis on credit ratings is reduced, investors are performing their own independent analyses, and investors had less confidence in the quality of ratings. However, a decrease in demand also could be a sign that the rule is having the unintended effect of causing users of credit ratings to cease purchasing access to current credit ratings or downloads of current credit ratings due to the availability of ratings histories disclosed on a twenty-four month delay.

To the extent NRSROs derive revenues from selling access to their ratings histories, the Commission acknowledges that the new rule may well have a negative impact on this revenue stream. As noted earlier, the amended rule, as adopted, does not require NRSROs to disclose the analysis or report that typically accompany a credit rating, which should also serve to mitigate any potential loss of subscribers to NRSROs' credit ratings histories. The Commission asked questions designed to quantify the amount of revenues derived by NRSROs from this activity but did not receive any revenue figures. However, information gathered by Commission staff over the course of discussions with NRSROs indicates that the amount of revenues they derived from selling access to ratings histories is not significant when compared to the revenues derived from other credit rating services. Nonetheless, the Commission encourages an NRSRO to notify the Commission if the rule causes a loss of this revenue source that is significant when compared to its total revenues. If that is the case, the Commission will re-examine the rule and review whether any action is appropriate.

The Commission also proposed, and requested comment on the appropriateness of, limiting the application of the proposed new disclosure requirements of paragraph (d)(3) of Rule 17g–2 to ratings initially determined on or after June 26, 2007, as well as comment on whether the data for ratings determined on or after that date would provide meaningful

information to users of credit ratings. The Commission asked, alternatively, whether the final rule should apply to ratings determined on or after a different date, such as the date of enactment of the Rating Agency Act, or to all outstanding credit ratings regardless of when issued.[75] Several commenters argued in favor of expanding the rule to cover all outstanding credit ratings,[76] with two stating that limiting disclosure to products initially rated on or after June 26, 2007 would exclude many of the structured finance products that contributed to the current financial crisis.[77] One commenter suggested that the rule be applied to all outstanding credit ratings starting three to five years ago,[78] while another stated that the disclosure required under the rule should include, at a minimum, the ''2005 underwriting cohort.'' [79] One commenter, stating that there is nothing in the Rating Agency Act that imposes a time-based limit on the Commission's authority to require disclosure, argued that rating history disclosure should be required for as many ratings as possible and suggested a starting date ''as early as the early 2000s'' as ''an absolute minimum.'' [80] Another commenter stated that the costs for issuer-paid NRSROs to provide ratings histories for all outstanding credit ratings would not be substantial, arguing that the data was already available in digitized form and that the conversion to the XBRL format would require relatively simple technology.[81]

Two commenters expressed their opposition to applying the proposed new disclosure rule to all outstanding credit ratings, arguing that such a requirement would entail undue costs and burdens.[82] One added that the benefit received from applying the disclosure requirements to all outstanding credit ratings would be of limited value.[83]

The Commission believes that using the date of effectiveness of the Rating Agency Act strikes an appropriate balance between the Commission's desire to maximize the amount of raw data to be disclosed and the potential costs of the disclosure. The amendment as adopted limits the application of the rule's new disclosure requirements to credit ratings issued after credit rating agencies were put on notice of the effectiveness of the Commission's new regulatory authority over NRSROs. The Commission believes that using the date of effectiveness of the Rating Agency Act will permit, on a reasonable timeline, the development of a robust set of data while limiting the burden on NRSROs.

The Commission also requested comments as to whether the proposed twelve-month grace period between the time a ratings action was taken and the time it would be required to be disclosed under proposed paragraph (d)(3) of Rule 17g–2 would be sufficient to address concerns regarding the revenues NRSROs derive from selling downloads of, and data feeds to, their current issuer-paid credit ratings.[84] The Commission received twelve comments in response to these inquiries.[85] Of these, three commenters expressed agreement with the proposed twelve-month grace period,[86] with one noting that a six-month grace period would also be sufficient.[87]

The commenters expressing disagreement with the proposed time lag offered a variety of suggestions as to the appropriate period. Three commenters argued for a longer grace period, citing the negative effects on revenue they expected would arise from a twelve-month period.[88] One commenter, arguing that the required disclosure would negatively impact sales of its historical database, expressed its belief that its database sales business would not be as negatively impacted if the Commission extended the time lag to at least 18 months. That commenter further expressed the belief that such a time lag would not impede third-party review of credit ratings performance.[89] One commenter suggested 36 months as the shortest possible delay to protect its subscription fees.[90] A third commenter, while stating that subscriber-paid NRSROs should never be required to disclose their ratings information, suggested a 2 to 3 year period as an alternative.[91] Two commenters argued that no grace period would be sufficient to avoid negatively impacting the revenues they derived from selling access to ratings history data.[92]

Other commenters suggested a shorter grace period,[93] with one suggesting a six-month time-lag,[94] another two suggesting a three month time-lag,[95] and one suggesting immediate disclosure.[96] As noted above, one commenter supported either a six-month or twelve-month lag.[97] One commenter that supported the six-month time lag expressed the belief that six months represented an appropriate balance between the private commercial interests of the NRSROs impacted and the wider public interests.[98] One commenter that supported the three-month time lag stated that the twelve-month time would not meet the stated goal of the proposal to make it easier for persons to analyze the actual performance and accuracy of NRSROs' credit ratings.[99] The other commenter supporting a three-month lag, noting that ''rating information that is even three months old is extremely stale by market standards,'' stated that a three-month lag would be more than adequate to protect NRSROs' interest in selling data feeds and may be adequate to serve the purposes of the disclosure regime.[100] The commenter suggesting immediate disclosure argued that such disclosure was necessary to serve as a market check for ''rating shopping.'' [101]

The amendment, as adopted, includes different grace periods depending on whether a rating is issuer-paid or not. For issuer-paid credit ratings, the amendment, as adopted, retains the proposed twelve-month grace period between the time a ratings action is taken and the time it must be disclosed. This twelve-month grace period is intended to provide a sufficient volume of historical credit ratings information to permit comparison of credit ratings performance without unduly affecting the revenues NRSROs derive from selling downloads of their current credit ratings and access to historic information about their outstanding credit ratings. As noted above, the Commission asked questions designed to quantify the amount of revenues derived by NRSROs from this activity

[75] *February 2009 Proposing Release,* 74 FR at 6488.

[76] *See, e.g.,* Council Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; Hunt Letter; Multiple-Markets Letter.

[77] *See* Colorado PERA Letter; Council Letter.

[78] *See* ASF/SIFMA Letter.

[79] *See* Multiple-Markets Letter.

[80] *See* Hunt Letter.

[81] *See* Multiple-Markets Letter.

[82] *See* DBRS Letter; ABA Committee Letter.

[83] *See* ABA Committee Letter.

[84] *February 2009 Proposing Release,* 74 FR at 6488.

[85] *See* JCR Letter; DBRS Letter; Fitch Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; Multiple-Markets Letter; R&I Letter; S&P Letter; Realpoint Letter; ABA Committee Letter; Rapid Ratings Statement; ICI Statement.

[86] *See* DBRS Letter; Fitch Letter; ABA Committee Letter.

[87] *See* DBRS Letter.

[88] *See* JCR Letter; R&I Letter; Realpoint Letter.

[89] *See* R&I Letter.

[90] *See* JCR Letter.

[91] *See* Realpoint Letter.

[92] *See* S&P Letter; Rapid Ratings Statement.

[93] *See* DBRS Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; Multiple-Markets Letter.

[94] *See* DBRS Letter; ASF/SIFMA Letter.

[95] *See* ICI Letter; Hunt Letter.

[96] *See* Multiple-Markets Letter.

[97] *See* DBRS Letter.

[98] *See* ASF/SIFMA Letter.

[99] *See* ICI Letter.

[100] *See* ICI Letter; Hunt Letter.

[101] *See* Multiple-Markets Letter.

but did not receive any revenue figures in response. The Commission notes, however, that one large NRSRO which primarily issues ratings under the issuer-paid business model stated that a twelve-month delay would be ''sufficient to protect the commercialization of ratings of any type.'' [102]

Based on the comments received, however, the Commission believes that a longer grace period is appropriate for ratings actions on ratings that are not issuer-paid. As such, the amendment, as adopted, allows for a delay of up to twenty-four months on ratings actions taken on such credit ratings. Issuer-paid credit ratings are generally made available on an NRSRO's Internet Web site free of charge for a designated period of time. For the NRSROs issuing such ratings, therefore, the 100% disclosure requirement adds a requirement that the NRSRO take data that has already been made public and, after a twelve-month grace period, make it permanently available in an aggregated form and in machine-readable (or later XBRL) format. In contrast, NRSROs operating under the subscriber-paid business model may only make their ratings available to paying subscribers. For these NRSROs, the 100% disclosure requirement will constitute a new disclosure, since it will require them to put into the public domain information that they generally do not make publicly available without collecting a fee.

In addition, although the Commission believes that the amended rule, as adopted, addresses the concerns raised by NRSROs regarding their ability to derive revenue from granting market participants access to their current credit ratings, the Commission also recognizes the possibility that this revenue may be negatively affected. If there were to be a negative impact, it will likely be disproportionately more significant for NRSROs that primarily or exclusively determine ratings paid for by subscribers compared to NRSROs that primarily or exclusively determine issuer-paid credit ratings. NRSROs that determine issuer-paid credit ratings earn the majority of their revenues from fees paid by issuers, underwriters, or sponsors. On the other hand, NRSROs that primarily or exclusively issue ratings paid for by subscribers derive their revenues almost entirely from the fees they charge subscribers. If subscribers consider non-current credit ratings as a reasonable substitute for current credit ratings, they may reconsider their subscriptions. In this case, NRSROs that primarily or exclusively issue ratings paid for by subscribers are more likely to lose a more significant proportion of their revenue than NRSROs that determine issuer-paid credit ratings. The twenty-four month grace period for the disclosure of ratings actions on non-issuer paid credit ratings is designed to counterbalance this potentially disproportionate ''substitution'' effect. The Commission anticipates that the longer delay between the time a ratings action is taken on a non-issuer paid credit rating and the time it must be disclosed will significantly reduce the chances of users of credit ratings viewing the ratings histories to be disclosed as a viable substitute for subscribing to current credit ratings.

The parties that pay subscription fees for access to NRSRO credit ratings and who pay for access to downloadable packages of issuer-paid and unsolicited credit ratings obtain access to the NRSRO's current views on the creditworthiness of obligors and debt instruments. Based on the comments of credit rating users and staff discussions with investors, the Commission believes that it would be unlikely that those parties would reconsider their purchase of those products due to the public availability of non-current ratings action information. The ability to receive data on a ratings action twenty-four months after it takes place would not appear to be an adequate substitute for subscribing to an NRSRO's current credit ratings, nor would the ability to download current credit ratings be a substitute for downloading credit ratings that are 12 months old. The Commission further believes, however, that while increasing the length of the grace period from twelve to twenty-four months for credit ratings that are not issuer-paid will delay the emergence of the robust data set generated by the 100% disclosure requirement, the 100% disclosure requirement as adopted will have a positive effect on furthering the purposes of the Rating Agency Act to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.

Increasing the length of the grace period even further as suggested by some commenters would delay the development of a robust set of ratings history data and further reduce the ability to include more recent (and potentially relevant) ratings actions in an evaluation of ratings quality. Decreasing the grace period would increase the risk that NRSROs would lose revenues from subscribers to their current credit ratings and downloads of their current credit ratings, as well as increase the risk of lost revenues from selling access to historic information about outstanding credit ratings. The grace periods adopted (twelve and twenty-four months) are intended to strike a balance between these two concerns, taking into account the particular effects with respect to issuer-paid and non issuer-paid credit ratings as discussed above. Furthermore, as noted above, the amended rule does not require NRSROs to disclose the analysis and report that typically accompany the publication of credit ratings, which should serve to further mitigate any potential loss of subscriber revenues or downloads. However, as noted above, the Commission intends to monitor the impact on revenues resulting from this disclosure requirement, as well as the benefits generated by this requirement.

As noted above, several commenters argued that the proposed 100% disclosure requirement was not narrowly tailored.[103] The Commission notes in response that the grace periods as well as the restriction of applicability of the new disclosure requirement to ratings initially determined on or after June 26, 2007, the effective date of the Ratings Agency Act, serve to appropriately narrow the application of the new disclosure requirement. Furthermore, as discussed above, the 100% disclosure requirement will provide different information and, as a result, differing types and customization of analysis, than the 10% disclosure requirement. The 100% disclosure requirement will, for example, allow a more granular analysis of how NRSROs each rated a specific obligor, security, or money market instrument, thereby furthering the goals of the Rating Agency Act to foster accountability, transparency, and competition in the credit rating industry. The Commission therefore believes that the amendment, as adopted, is narrowly tailored to meet the purposes of the Exchange Act and the Rating Agency Act.

Finally, the Commission notes that it has not yet published the List of XBRL Tags for NRSROs on its Internet Web site. The disclosure requirements of paragraph (d) of Rule 17g–2 as adopted in the *February 2009 Adopting Release,* which require NRSROs to make publicly available, in XBRL format and on a six-month delayed basis, the ratings histories for a random sample of 10% of issuer-paid credit ratings, became effective on August 10, 2009. On August 5, 2009, the Commission provided

[102] *See* Fitch Letter.

[103] *See, e.g.,* DBRS Letter; Moody's Letter; S&P Letter.

notice that an NRSRO subject to those disclosure provisions can satisfy the requirement to make publicly available ratings history information in an XBRL format by using an XBRL format or any other machine-readable format, until such time as the Commission provides further notice.[104] Consistent with this approach, new paragraph (d)(3) as adopted will allow an NRSRO to make the required data available in an interactive data file in any machine-readable format, including XBRL, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the List of XBRL Tags for NRSROs published by the Commission.

For the reasons discussed above, the Commission is adopting the proposed new paragraph (d)(3) with the following modifications: (1) The disclosure requirement is not limited to issuer-paid credit ratings but rather applies to any type of NRSRO credit rating (*i.e.,* issuer-paid, subscriber-paid, and unsolicited), (2) the grace period between the time a ratings action is taken and the time by which it must be disclosed has been increased from the proposed twelve months to twenty-four months for ratings actions related to non issuer-paid credit ratings, and (3) an NRSRO may make the required data available in an interactive data file in any machine-readable format, including XBRL, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the List of XBRL Tags for NRSROs.

As adopted, paragraph (d)(3)(i)(A) of Rule 17g–2 requires an NRSRO to make publicly available on its corporate Internet Web site in an interactive data file that uses a machine-readable format the ratings action information required to be retained pursuant to paragraph (a)(8) of Rule 17g–5 (the ratings history information for all current credit ratings) for any credit rating initially determined by the nationally recognized statistical rating organization on or after June 26, 2007. Paragraph (d)(3)(i)(B) of Rule 17g–2, as adopted, provides that any ratings action information required to be made and kept publicly available on the NRSRO's corporate Internet Web site pursuant to paragraph (d)(3)(i)(A) with respect to credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated need not be made public less than twelve months from the date such ratings action is taken. Consequently, under this provision, the grace period for disclosing ratings history information for issuer-paid credit ratings is twelve months. Paragraph (d)(3)(i)(C), as adopted, provides that any ratings action information required to be made and kept publicly available on the NRSRO's corporate Internet Web site pursuant to paragraph (d)(3)(i)(A) with respect to credit ratings other than those referred to in paragraph (d)(3)(i)(B) need not be made public less than twenty-four months from the date such ratings action is taken. Consequently, under this provision, the grace period for disclosing ratings history information for any credit rating other than issuer-paid credit ratings is twenty-four months. This includes subscriber-paid credit ratings. Finally, as adopted, paragraph (d)(3)(ii) of Rule 17g–2 provides that in making the information required under paragraph (d)(3)(i)(A) available in an interactive data file on its corporate Internet Web site, the NRSRO shall use any machine-readable format, including but not limited to XBRL format, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO shall make this information available in an interactive data file on its corporate Internet Web site in XBRL format using the List of XBRL Tags for NRSROs as published by the Commission on its Internet Web site.

The Commission is adopting these amendments, in part, under authority to require NRSROs to make and keep for specified periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[105] The Commission believes the new recordkeeping and disclosure requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

As discussed above, the Commission recognizes that the amended rule could affect the revenues of NRSROs. Nevertheless, the Commission believes that the amended rule, as adopted, strikes an appropriate balance in furthering the purposes of the Rating Agency Act to increase transparency, accountability, and competition in the credit rating industry by providing users of credit ratings, investors, and other market participants and observers with the maximum amount of raw data with which to gauge the performance of NRSROs over time without unduly affecting NRSROs' ability to derive revenue from granting market participants access to their credit ratings and downloads of their credit ratings.

Accordingly, the Commission is adopting the amendments to paragraph (d) of Rule 17g–2 with the modifications discussed above.

III. Final Amendments to Rule 17g–5 and Regulation FD

A. Summary and Background

Rule 17g–5 [106] identifies a series of conflicts of interest arising from the business of determining credit ratings. Under the rule, some of these conflicts must be disclosed and managed, while others are prohibited outright. In the *June 2008 Proposing Release,* the Commission proposed amending the rule to place additional requirements with respect to the conflict of being paid by the arranger of a structured finance product to rate the product as well as three new categories of conflicts of interest to be prohibited outright.[107] In the *February 2009 Adopting Release,* the Commission adopted the three new categories of prohibited conflicts of interest.[108] The Commission did not,

[104] *See Notice Regarding the Requirement to Use eXtensible Business Reporting Language Format to Make Publicly Available the Information Required Pursuant to Rule 17g–2(d) of the Exchange Act,* Exchange Act Release No. 60451 (August 5, 2009), 74 FR 40246 (August 11, 2009).

[105] *See* Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

[106] 17 CFR 240.17g–5.

[107] *See June 2008 Proposing Release,* 73 FR at 36128–36228. The Commission's set of initial regulations implementing the Rating Agency Act designated eight types of conflicts of interest required to be disclosed and managed and prohibited outright four types of conflicts of interest. *See June 2007 Adopting Release,* 72 FR at 33595–33599.

[108] *See February 2009 Adopting Release,* 74 FR at 6465–6469. The three new categories of conflicts of interest prohibited outright are (1) issuing or maintaining a credit rating with respect to an obligor or security where the NRSRO or a person associated with the NRSRO made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security, (2) issuing or maintaining a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a person within the NRSRO who has responsibility for participating in determining or approving credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models, and (3) issuing or maintaining a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business

however, adopt the new requirements that would have been triggered by the conflict of being paid by an arranger to rate a structured finance product. Instead, in the *February 2009 Proposing Release,* the Commission re-proposed the amendments with substantial modifications.[109] As discussed in detail below, the Commission is adopting the amendments substantially as re-proposed.

In the *June 2008 Proposing Release,* the Commission proposed to amend paragraph (b) of Rule 17g–5 by re-designating the existing paragraph (b)(9) of the rule as (b)(10) and creating a new paragraph (b)(9) identifying the conflict: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[110] In connection with specifying this type of conflict, the Commission proposed amendments to paragraph (a) of Rule 17g–5 that would have established additional conditions—beyond disclosing the conflict and establishing procedures to manage it—that would need to be met for an NRSRO to issue or maintain a credit rating subject to this conflict.[111]

Specifically, the Commission proposed a new paragraph (a)(3) in the *June 2008 Proposing Release* that would have required, as a condition to the NRSRO rating a structured finance product, that the information provided to the NRSRO and used by the NRSRO in determining an initial credit rating and, thereafter, performing surveillance on the credit rating be disclosed through a means designed to provide reasonably broad dissemination of the information. The proposed amendments did not specify which entity—the NRSRO or the arranger—would need to disclose the information. The proposed amendments would have required further that, for offerings not registered under the Securities Act, the information would need to be disclosed only to investors and credit rating agencies on the day the offering price is set and, subsequently, publicly disclosed on the first business day after the offering closes.[112] The Commission also provided in the *June 2008 Proposing Release* three proposed interpretations of how the information could be disclosed under the requirements of the proposed rule in a manner consistent with the provisions of the Securities Act. These interpretations addressed disclosure under the proposed amendment in the context of public, private, and offshore securities offerings.[113]

As discussed in the *February 2009 Proposing Release,* the majority of commenters addressing the proposal to amend paragraphs (a) and (b) of Rule 17g–5 set forth in the *June 2008 Proposing Release* opposed the proposed amendments or raised substantial practical or legal questions about how they would operate, particularly with respect to publicly disclosing the information.[114] In response to the concerns raised by commenters, the Commission made significant changes to the proposed amendments and re-proposed them for further comment. Under the re-proposed amendments: (1) NRSROs that are hired by arrangers to perform credit ratings for structured finance products would have been required to disclose on a password-protected Internet Web site the deals for which they have been hired and provide access to that site to non-hired NRSROs that have furnished the Commission with the certification described below; (2) NRSROs that are hired by arrangers to perform credit ratings for structured finance products would have been required to obtain representations from those arrangers that the arranger would provide information given to the hired NRSRO to non-hired NRSROs that have furnished the Commission with the certification described below as well; and (3) NRSROs seeking to access information maintained by the NRSROs and the arrangers pursuant to the new rule would have been required to furnish the Commission an annual certification that they are accessing the information solely to determine credit ratings and would determine a minimum number of credit ratings using the information.[115]

The Commission received letters from nineteen commenters in response to the re-proposed amendments to Rule 17g–5.[116] A majority of those commenters expressed their general support for the proposal,[117] with several commenters expressing their belief that the disclosure required under the amendments would have a positive effect on competition within the credit rating industry.[118] One commenter favoring the re-proposed amendments noted the benefit of a ''level playing field,'' [119] while another expressed a belief that the proposed disclosure requirement would result in ''true competition'' in the credit rating industry.[120]

A smaller number of commenters, however, expressed their general disagreement with the re-proposed amendments.[121] One commenter argued that the re-proposed amendments would result in non-hired NRSROs being motivated to offer the most favorable preliminary ratings that the disclosed data would permit in order to encourage arrangers to abandon the originally hired NRSRO in favor of the non-hired NRSRO in order to obtain a ''sweeter'' final rating. The same commenter also argued that the proposal would favor large NRSROs with market power at the expense of smaller NRSROs.[122] Another commenter expressed concerns that the proposed new requirements would cause small originators of structured finance products to abandon that market due to the costs associated with the proposed disclosure requirements.[123]

One commenter cautioned that the proposal could reinforce, rather than diminish, an issuer's ability to engage in ''ratings shopping'' by creating incentives for issuers to shop for the NRSRO that will demand the least information in the initial rating process.[124] The Commission has expressed its concern over the practice of ''ratings shopping'' in the past.[125] In

activities such as meetings that have an aggregate value of no more than $25.

[109] *See February 2009 Proposing Release,* 74 FR at 6493–6497.

[110] *See June 2008 Proposing Release,* 73 FR at 36219–36226, 36251.

[111] *See id.*

[112] *See id.* This proposed requirement would have been in addition to the current requirements of paragraph (a) that an NRSRO disclose the type of conflict of interest in Exhibit 6 to Form NRSRO; and establish, maintain and enforce written policies and procedures to address and manage the conflict of interest. 17 CFR 240.17g–5(a)(1) and (2).

[113] *See June 2008 Proposing Release,* 73 FR at 36222–36226.

[114] *See February 2009 Proposing Release,* 74 FR at 6491–6492.

[115] *See February 2009 Proposing Release,* 74 FR at 6492–6497.

[116] *See* Marchywka Letter; JCR Letter; Council Letter; DBRS Letter; FSR Letter; Fitch Letter; Colorado PERA Letter; ASF/SIFMA Letter; ICI Letter; Hunt Letter; R&I Letter; S&P Letter; Moody's Letter; Realpoint Letter; ABA Committee Letter; CMSA Letter; CreditSights Statement; Moody's Statement; Realpoint Statement; RiskMetrics Statement; Egan-Jones Statement; ASF Statement.

[117] *See e.g.,* Marchywka Letter; Council Letter; FSR Letter; Colorado PERA Letter; Hunt Letter; Realpoint Letter; ABA Committee Letter; CreditSights Statement; Realpoint Statement; Riskmetrics Statement; Egan-Jones Statement.

[118] *See e.g.,* Hunt Letter, Riskmetrics Statement, Egan-Jones Statement.

[119] *See* Riskmetrics Statement.

[120] *See* Egan-Jones Statement.

[121] *See e.g.,* JCR Letter; ASF/SIFMA Letter; Moody's Letter; Moody's Statement; ASF Statement.

[122] *See* JCR Letter.

[123] *See* R&I Letter.

[124] *See* Moody's Letter.

[125] *See e.g., June 2008 Proposing Release,* 73 FR at 36218.

both the *June 2008 Proposing Release* and the *February 2009 Proposing Release,* the Commission noted that the amendments to Rule 17g–5 as proposed in the former release and re-proposed in the latter could help address ratings shopping by exposing an NRSRO that employed less conservative ratings methodologies in order to gain business.[126] In addition, the Commission has noted, the proposed amendments also could mitigate the impact of rating shopping, since NRSROs not hired to rate a deal could nonetheless issue a credit rating.[127]

The Commission recognizes that an increase in the number of credit ratings available to investors by definition entails an increase in the number of NRSROs issuing those ratings, thereby giving issuers a broader pool of NRSROs among which to ''shop'' for a rating. The Commission also recognizes the concern that NRSROs not hired by the arranger might have the incentive to use information accessed pursuant to Rule 17g–5 as amended to issue an unduly favorable rating in an attempt to procure future business from a particular arranger. The Commission believes that there are several factors counteracting this incentive. First, the 100% disclosure requirement set forth in Rule 17g–2(d), as amended, will facilitate the ability of investors, academics and other users of credit ratings to directly compare the credit rating performance of all NRSROs issuing a credit rating for a given structured finance product, whether the NRSROs are hired by the arranger to do so or instead are issuing unsolicited ratings based on information obtained under the disclosure requirements of Rule 17g–5 as amended. This will likely enhance both hired and non-hired NRSRO's accountability for the ratings they issue. Second, the information available pursuant to Rule 17g–5 will be accessible to all NRSROs, including NRSROs operating under the subscriber-paid model. Since the latter are not compensated by the structured products' arrangers, they can issue unsolicited ratings without the pressure of worrying about the effect that the unsolicited ratings might have on their future revenue stream from arrangers of structured finance. Finally, by facilitating the issuance of unsolicited ratings, the amendments to Rule 17g–5 may serve to mitigate the potential for ratings shopping, since an arranger that ''shopped'' in order to obtain a higher rating would still face the possibility of non-hired NRSROs issuing lower ratings.

The Commission is adopting the re-proposed amendments substantially as proposed in order to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Currently, when an NRSRO is hired to rate a structured finance product, some of the information it relies on to determine the rating is generally not made public. As a result, structured finance products frequently are issued with ratings from only one or two NRSROs that have been hired by the arranger, with the attendant conflict of interest that creates. The amendments to Rule 17g–5 are designed to increase the number of credit ratings extant for a given structured finance product and, in particular, to promote the issuance of credit ratings by NRSROs that are not hired by the arranger. This will provide users of credit ratings with more views on the creditworthiness of the structured finance product. In addition, the amendments are designed to reduce the ability of arrangers to obtain better than warranted ratings by exerting influence over NRSROs hired to determine credit ratings for structured finance products. Specifically, opening up the rating process to more NRSROs will make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the credit ratings issued by other NRSROs.

B. Paragraph (b)(9) of Rule 17g–5

New paragraph (b)(9) of Rule 17g–5 identifies the following conflict required to be disclosed and managed under paragraph (a) of the rule: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[128] The Commission intends this provision, which mirrors, in part, the text of Section 15E(i)(1)(B) of the Exchange Act (enacted as part of the Rating Agency Act),[129] to cover the full range of structured finance products, including, but not limited to, securities collateralized by static and actively managed pools of loans or receivables (*e.g.,* commercial and residential mortgages, corporate loans, auto loans, education loans, credit card receivables, and leases), collateralized debt obligations, collateralized loan obligations, collateralized mortgage obligations, structured investment vehicles, synthetic collateralized debt obligations that reference debt securities or indexes, and hybrid collateralized debt obligations.

As the Commission noted when initially proposing new paragraph (b)(9) in the *June 2008 Proposing Release,* the conflict identified in new paragraph (b)(9) is a subset of the broader conflict already identified in paragraph (b)(1) of Rule 17g–5; namely, ''being paid by issuers and underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite.'' [130] In the case of structured finance products, the Commission believes this ''issuer/underwriter-pay'' conflict is particularly acute because certain arrangers of structured finance products repeatedly bring ratings business to the NRSROs.[131] As sources of frequent, repeated deal-based revenue, some arrangers have the potential to exert greater undue influence on an NRSRO than, for example, a corporate issuer that may bring far less ratings business to the NRSRO.[132]

In the *February 2009 Proposing Release,* the Commission requested comment both generally on proposed new paragraph (b)(9) of Rule 17g–5 and on the specific question of whether the definition of the securities and money market instruments giving rise to the specific conflict—instruments issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction—should be broadened or narrowed.[133] One commenter argued that the definition as proposed was too broad and suggested that structured finance products should be defined identically to ''asset-backed securities'' in Regulation AB [134] or ''expanded with sufficient precision to clarify the intended scope.'' [135] In both the *June*

[126] *See June 2008 Proposing Release,* 73 FR at 36243; *February 2009 Proposing Release,* 74 FR 6506.

[127] *Id.*

[128] In connection with the adoption of new paragraph (b)(9) of Rule 17g–5, the Commission is re-designating the pre-existing paragraph (b)(9) as paragraph (b)(10).

[129] 15 U.S.C. 78o–7(i)(1)(B).

[130] 17 CFR 240.17g–5(b)(1). As the Commission noted when adopting Rule 17g–5, the concern with the conflict identified in paragraph (b)(1) ''is that an NRSRO may be influenced to issue a more favorable credit rating than warranted in order to obtain or retain the business of the issuer or underwriter.'' *June 2007 Adopting Release,* 72 FR at 33595.

[131] *See e.g.,* Testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (April 22, 2008) pp. 4–6.

[132] *Id.; see also, June 2008 Proposing Release,* 73 FR at 36219.

[133] *See February 2009 Proposing Release,* 74 FR at 6493.

[134] *See* 17 CFR 1101(c).

[135] *See* ABA Committee Letter.

2008 Proposing Release and the *February 2009 Proposing Release,* however, the Commission explicitly stated its intention to broaden the scope of the proposed amendments rather than restrict it to structured finance products meeting narrower definitions such as the one set forth in Regulation AB.[136]

In the *February 2009 Proposing Release, the* Commission stated that its intent is to have the definition be sufficiently broad to cover all structured finance products and noted that Section 15E(i)(1)(B) of the Exchange Act (adopted as part of the Rating Agency Act) uses identical language to describe a potentially unfair, coercive or abusive practice relating the ratings of securities or money market instruments.[137] Furthermore, the Commission adopted Rule 17g–6(a)(4),[138] in part, under this statutory authority, and Rule 17g–6(a)(4) uses the same language—securities or money market instruments ''issued by an asset pool or mortgage-backed securities transaction''—to describe the prohibitive practice. As used in Rule 17g–6 and Rule 17g–5, the Commission intends this definition to cover the broad range of structured finance products, including, but not limited to, securities collateralized by pools of loans or receivables (*e.g.,* mortgages, auto loans, school loans, credit card receivables), collateralized debt obligations, collateralized loan obligations, synthetic collateralized debt obligations that reference debt securities or indexes, and hybrid collateralized debt obligations. The Commission continues to believe that the broader definition will appropriately result in the amended rules' application to a larger segment of credit ratings.

The Commission is adopting new paragraph (b)(9) of Rule 17g–5 as proposed.

C. Paragraph (a)(3) of Rule 17g–5

The Commission also is adopting new paragraphs (a)(3)(i), (ii), and (iii) of Rule 17g–5 substantially as proposed. New paragraph (a)(3)(i) requires an NRSRO subject to the conflict set forth in new paragraph (b)(9) to maintain a password-protected Internet Web site containing a list of each structured finance security or money market instrument for which it currently is in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii), as discussed below, can be accessed.[139]

New paragraph (a)(3)(ii) requires an NRSRO subject to the conflict to provide free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in new paragraph (e) of Rule 17g–5 (discussed below) that covers that calendar year.[140] Taken together, new paragraphs (a)(3)(i) and (ii) of Rule 17g–5 create a mechanism requiring NRSROs hired to rate structured finance products to alert other NRSROs that an arranger has initiated the rating process and to promptly inform the other NRSROs where information being provided by the arranger to the hired NRSRO to determine the credit rating may be obtained.

Several commenters addressed the issue of the password protected Internet Web site to be maintained by hired NRSROs.[141] Three commenters expressed support for the concept,[142] with one noting that the requirements ''to establish and maintain such web sites and to post very limited information on such web sites do not appear to be unduly burdensome to NRSROs.'' [143] Three other commenters opposed the requirement, arguing that the costs of creating and maintaining a Web site are significant and would negatively impact smaller NRSROs in addition to potentially creating security risks.[144] The Commission is sensitive to the costs of the new requirement but does not believe they are significant. All of the NRSROs currently maintain Internet Web sites, in most cases with password-protected portals that their subscribers and registered users can access to obtain information posted by the NRSRO. Consequently, adding a portal for other NRSROs to access pending deal information is not expected to require significant additional Internet Web site design and maintenance.

The Commission requested comment as to whether the information required to be maintained on the NRSRO's Internet Web site would be sufficient to alert other NRSROs that the rating process has commenced and where they can locate information to determine an unsolicited rating, or whether the Commission should, for example, require an e-mail alert to be sent to all NRSROs that have access to the site as well.[145] One commenter suggested that instead of requiring NRSROs to maintain the list of deals, the Commission require arrangers to notify non-hired NRSROs of new deals by e-mail or, alternatively, that the Commission implement a pilot project to set up and maintain a Web site with information provided by the NRSROs and/or arrangers.[146] Two commenters, however, expressed their opposition to requiring NRSROs to send e-mails in addition to or in lieu of requiring them to maintain the Web site described in new paragraph (a)(3)(i), noting that monitoring such a Web site would be a simple and a non-time-consuming process for non-hired NRSROs.[147] One further noted that if e-mails were required, an NRSRO interested in determining its own ratings would have to monitor their e-mail for update messages from other NRSROs and still check other NRSROs' Web sites in order to obtain the relevant information before checking the relevant issuer portals.[148] The second commenter also argued that an NRSRO should not have to send an e-mail to other NRSROs that may have no interest in rating a particular transaction.[149]

The Commission is adopting the requirement that the hired NRSRO

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[136] *See June 2008 Proposing Release,* 73 FR at 36213 note 15; *February 2009 Proposing Release,* 74 FR 6493.

[137] *See* 15 U.S.C. 780–7(i)(1)(B); *see also February 2009 Proposing Release,* 74 FR 6493.

[138] 17 CFR 240.17g–6(a)(4).

[139] As noted in the *February 2009 Proposing Release,* the text of proposed paragraph (a)(3)(i) refers to transactions where the NRSRO is in the process of determining an ''initial'' credit rating. The Commission does not intend that the rule require the NRSRO to include on the Internet Web site information about securities or money market instruments for which the NRSRO has published an initial rating and is monitoring the rating. Consequently, upon publication of the initial rating, the NRSRO can remove the information about the security or money market instrument from the list it maintains on the Internet Web site. The Commission notes that the information on the arranger's Web site would remain available. If, however, the arranger decides to terminate the rating process before the hired NRSRO published an initial rating, the NRSRO would be permitted to remove the information from the list. *See February 2009 Proposing Release,* 74 FR at 6493–6494.

[140] The Commission notes that, pursuant to Section 17 of the Exchange Act as well as the rules thereunder (including Rule 17g–2), representatives of the Commission will have access to the information required to be disclosed on the NRSRO's Internet Web site pursuant to Rule 17g–5.

[141] *See, e.g.,* DBRS Letter, ASF/SIFMA Letter, S&P Letter, Realpoint Letter, ABA Committee Letter, CMSA Letter.

[142] *See* Realpoint Letter; RiskMetrics Statement; ABA Committee Letter.

[143] *See* ABA Committee Letter.

[144] *See* DBRS Letter; ASF/SIFMA Letter; Moody's Letter.

[145] *See February 2009 Proposing Release,* 74 FR at 6494.

[146] *See* DBRS Letter.

[147] *See* S&P Letter; Moody's Letter.

[148] *See* Moody's Letter.

[149] *See* S&P Letter.

maintain an Internet Web site identifying pending deals as proposed. The Commission agrees with those commenters that are of the view that it is not necessary to require a hired NRSRO to send e-mail alerts to other NRSROs every time it is hired to rate a new transaction, either in addition to or in lieu of the hired NRSRO maintaining a list of its transactions on a password-protected Internet Web site. Concentrating the information about pending deals at the Internet Web site maintained by the hired NRSRO will permit other NRSROs to sort through the list of pending transactions and decide which arranger Web sites they want to access to obtain the information necessary to determine a credit rating. Further, the Commission requires the hired NRSRO to promptly disclose the required information on its Internet Web site, thereby notifying the non-hired NRSROs of the pending deal as soon as possible.[150] The Commission believes that the non-hired NRSRO will be better served by the ability to access, periodically at their own convenience, the lists of all pending transactions maintained on the hired NRSROs' Internet Web sites in order to determine whether any new deals have been initiated. The Commission does not believe that one-time notice e-mails are an adequate alternative in lieu of hired NRSROs maintaining lists of pending transactions. While the Commission does not believe it necessary to require hired NRSROs to send e-mail notices in addition to maintaining such lists, the Commission encourages hired NRSROs to voluntarily supplement maintaining the required lists of pending transactions by offering to notify other registered NRSROs by e-mail alert whenever they are hired to rate new transactions. This way the other NRSROs can decide for themselves whether they want to receive e-mail alerts or monitor the Internet Web sites.

As the Commission noted in the *February 2009 Proposing Release,* the text of paragraph (a)(3)(i) refers to transactions where the NRSRO is in the process of determining an ''initial'' credit rating.[151] The rule does not require the NRSRO to include on the Internet Web site information about securities or money market instruments once the NRSRO has published the initial rating and is monitoring the rating. The amendment is designed to alert other NRSROs about new deals and direct them to the Internet Web site of the arranger where information to determine initial ratings and monitor the ratings can be accessed. Consequently, upon publication of the initial rating, the NRSRO can remove the information about the security or money market instrument from the list it maintains on the Internet Web site. Similarly, if the arranger decides to terminate the rating process before a hired NRSRO publishes an initial rating, the NRSRO would be permitted to remove the information from the list. As discussed in more detail below, however, the representations a hired NRSRO will be required to obtain from an arranger include a representation that once an instrument is rated, the arranger will be required to post on its password-protected Internet Web site any information provided to the hired NRSRO for surveillance purposes.

The Commission is making clarifying changes to the text of new paragraphs (a)(3)(ii) and (a)(3)(iii) of Rule 17g–5 as proposed. As discussed above, that paragraph requires an NRSRO subject to the conflict set forth in new paragraph (b)(9) of Rule 17g–5 to provide free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in new paragraph (e) of Rule 17g–5 (discussed below) that covers that calendar year. The Commission is revising the proposed amendment to clarify that the hired NRSRO need only provide access to its password-protected Internet Web site to a non-hired NRSRO whose certification indicates that it has either (1) determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to Rule 17g–5(a)(3) as amended in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or (2) has not accessed information pursuant to Rule 17g–5(a)(3) as amended 10 or more times in the calendar year prior to the year covered by the certification. This revision ensures that hired NRSROs will only be required to provide access to their password-protected Internet Web sites to non-hired NRSROs that have met the requirements set forth in the certification to be provided to the Commission pursuant to new paragraph (e) of Rule 17g–5 as amended. The Commission is further clarifying that a non-hired NRSRO would not be precluded from accessing the hired-NRSRO's Internet Web site if at some point prior to the most recently ended calendar year the NRSRO accessed the Web site 10 or more times. For example, if a non-hired NRSRO accessed the Web site 10 or more times in year 1, but did not access the Web site in year 2, the non-hired NRSRO would then be permitted to access the Internet Web site in year 3.

Accordingly, the Commission is adopting the amendments establishing new paragraphs (a)(3)(i) and (ii) of Rule 17a–5 substantially as proposed, with the revisions to the text as proposed as discussed above.

New paragraph (a)(3)(iii) of Rule 17g–5, adopted substantially as proposed, requires an NRSRO subject to the conflict set forth in new paragraph (b)(9) to obtain four representations from an arranger that hires it to rate a structured finance product: (1) Pursuant to paragraph (a)(3)(iii)(A) the arranger must represent that it will maintain the information described in paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of Rule 17g–5 available on an identified password-protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating; (2) pursuant to paragraph (a)(3)(iii)(B) of Rule 17g–5 the arranger must represent that it will provide access to that password-protected Internet Web site to any NRSRO that provides it with a copy of the certification described in new paragraph (e) of Rule 17g–5 (discussed below) that covers the current calendar year; (3) pursuant to paragraph (a)(3)(iii)(C) of Rule 17g–5 the arranger must represent that it will post on that password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the NRSRO;[152] and (4) pursuant to paragraph (a)(3)(iii)(D) of Rule 17g–5 the

[150] The Commission will take seriously any indications that the hired NRSRO is not complying with the requirement to promptly disclose the information pursuant to new paragraph (a)(3)(i) of Rule 17g–5.

[151] *See February 2009 Proposing Release,* 74 FR at 6493.

[152] The Commission expects that all the information will be provided in the same format. For example, if the arranger provides information to the hired NRSRO in downloadable and/or searchable format, the Commission expects the arranger to provide the same information in the same format on its Internet Web site. The Commission will take seriously any concerns raised in this regard.

arranger must represent that it will post on the password-protected Internet Web site all information the arranger provides to the NRSRO for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the NRSRO.

The representations required to be obtained by an NRSRO, as described in new paragraphs (a)(3)(iii)(A) through (D) of Rule 17g–5, taken together, provide that an arranger of a structured finance product agrees to make the information it provides to hired NRSROs, whether provided for the purpose of determining an initial rating or for monitoring a rating, available to other NRSROs. The hired NRSRO must obtain from the arranger a representation that the arranger will post that information on the arranger's Internet Web site at the same time it is given to the hired NRSRO, and that any time the information is updated or new information is given to the hired NRSRO, the arranger will post that information on its Internet Web site contemporaneously. An NRSRO also will be required to obtain from the arranger a representation that the arranger will tag the information in a manner that informs NRSROs accessing the Web site which information currently is operative for the purpose of determining the credit rating in order to ensure that NRSROs accessing the Internet Web site use the correct information to determine their credit ratings. Paragraph (a)(3)(iii) of Rule 17a–5, as adopted, adds the word ''written'' to the proposed text in order to clarify that these representations must be obtained in writing in order to ensure that they are formally documented and executed.

An NRSRO will violate Rule 17a–5(a)(3) if it determines an initial credit rating or maintains an existing credit rating for a structured finance product that is paid for by an arranger unless that NRSRO obtains a written representation from the arranger, upon which the NRSRO can reasonably rely, that the arranger will take the steps set forth in paragraph (a)(3)(iii)(A) through (D). One commenter expressed concern over the proposed amendment's standard of ''reasonable'' reliance on an arranger's representations.[153] The question of whether reliance was reasonable will depend on the facts and circumstances of a given situation. Factors relevant to this analysis would include, but not be limited to: (1) Ongoing or prior failures by the arranger to adhere to its representations; or (2) a pattern of conduct by the arranger where it fails to promptly correct breaches of its representations. Further, the Commission recognizes that Internet Web sites periodically malfunction. Depending on the facts, a limited Internet Web site malfunction by itself would not cause the NRSRO to no longer be able to rely reasonably on a written representation from that arranger.

In addition to the scope of the safe harbor, commenters raised a number of other concerns in connection with paragraph (a)(3)(iii) as proposed.[154] Several commenters objected to the requirement that NRSROs obtain representations from arrangers, arguing that doing so inappropriately places NRSROs in the position of enforcing arranger compliance with disclosure requirements.[155] One commenter suggested that the required representations be made to the Commission instead of the hired NRSRO.[156] The Commission believes that the structure of the rule as amended is consistent with the Commission's regulation of NRSROs. The Commission notes that the rule as amended is designed to make clear the steps an NRSRO must take to provide a credit rating for a particular arranger. An NRSRO is not required to enforce compliance; however, if, for example, an NRSRO had knowledge that an arranger had not complied with its representations, the NRSRO would be on notice that future reliance on that arranger might not be reasonable. The Commission believes it is likely that the required representations will be part of the standard contracts entered into between NRSROs and arrangers and that an arranger that fails to comply with its representations will risk having the hired NRSRO withdraw the credit ratings paid for by that arranger and being denied the ability to obtain credit ratings from the hired NRSRO in the future, given that the hired NRSRO may not be able to reasonably rely on the safe harbor. The Commission believes that the consequences of losing the safe harbor should provide sufficient incentive for NRSROs to ensure that they obtain the representations from arrangers as set forth in paragraph (a)(3)(iii) and that arrangers comply with their representations.

Another commenter argued that the duty to make the required information available should fall entirely on the hired NRSRO.[157] The Commission believes that arrangers are best positioned to disclose the information necessary to allow the NRSRO-users to determine credit ratings. The disclosure representation to be obtained from an arranger will apply to any information provided to a hired NRSRO, of which there may be more than one. One of the hired NRSROs may ask for more information than the other hired NRSROs. Allocating the responsibility of disclosure to the arranger will promote the most consistent and orderly dissemination of information to the NRSRO-users and allow them to access all relevant deal information in a single location rather than on multiple hired NRSROs' Internet Web sites.

Another commenter argued that requiring NRSROs to obtain such representations would have a chilling effect on oral communications by the issuer to the NRSRO and argued that the proposed amendment was an inappropriate means of regulating issuers' conduct.[158] The representations an NRSRO will be required to obtain from an arranger are not intended to result in the arranger providing different information to a hired NRSRO than it would otherwise, much less to ''regulate'' issuer conduct. The Commission acknowledges that the requirements of paragraph (a)(3) of Rule 17g–5 as a whole likely will formalize the process of information exchange from the arranger to the NRSRO for structured finance products, including the written submission of information that may, in the past, have been provided orally. However, the Commission believes this will be a positive development. First, conveying information in writing rather than orally may promote credit rating accuracy in that the NRSRO analyst will be able to refer back to a document containing the information rather than his or her memory. Second, a more formal process of information exchange will create a better record of the data provided to the NRSRO, which will make it easier for Commission staff to understand the process used to determine the credit rating during an after-the-fact review of whether the NRSRO adhered to its procedures and methodologies for determining such credit ratings. This will benefit the NRSRO's compliance

[153] *See* Fitch Letter.

[154] *See e.g.*, Council Letter; DBRS Letter; Fitch Letter; ASF/SIFMA Letter; Moody's Letter; Realpoint Letter; ABA Committee Letter; CMSA Letter; RiskMetrics Statement; Colorado PERA Letter.

[155] *See* Fitch Letter; Moody's Letter; ABA Committee Letter.

[156] *See* ABA Committee Letter.

[157] *See* ASF/SIFMA Letter.

[158] *See* Moody's Letter.

and internal audit functions as well as the Commission's examination function and benefit users of credit ratings.

The Commission requested comment as to whether the NRSRO should be required to obtain a representation from the arranger that the arranger will not provide any information to the hired NRSRO that is material without also disclosing that information on the arranger's Internet Web site.[159] The three commenters directly addressing this issue responded in the affirmative.[160] The Commission believes, however, that the representations the hired NRSRO will be required to obtain from an arranger, as set forth in paragraphs (a)(3)(iii)(C) and (D) as proposed, are sufficient to advance the purposes of the rule as amended. One commenter suggested that the Commission broaden the proposed amendment to permit unsolicited, subscriber-paid NRSROs to contact an arranger with questions regarding the information provided, or to be provided, on its password-protected Internet Web site for purposes of determining or monitoring a credit rating.[161] The Commission believes that the representations an NRSRO will be required to obtain from an arranger are sufficient to accomplish the goals of the rule, as amended, and that it would be beyond the intended scope of the rule, as amended, to require arrangers to take on the responsibility of answering questions from the non-hired NRSROs obtaining access to the information that the arranger has disclosed.

Finally, one commenter stated that arranger, trustee, servicer and special servicer information and reports should be included in the arrangers' representation to disclose under paragraph (a)(3)(iii) of Rule 17g–5.[162] The Commission agrees with this comment. The Commission recognizes that in many cases, the data required to monitor the rating of a structured finance product is provided by third parties such as trustees or loan servicers. In proposing the amendments to paragraph (a) of Rule 17g–5, the Commission did not intend to exclude such information from disclosure to non-hired NRSROs and potentially provide arrangers with an incentive to delegate the provision of information regarding a structured finance product to third parties in order to avoid such disclosure. Accordingly, the Commission is adding the language ''or contracts with a third party to provide to the nationally recognized statistical rating organization'' to new paragraphs (a)(3)(iii)(C) and (D) of Rule 17g–5 in order to clarify that the proposed language ''all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument'' and ''all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument'' includes all information the issuer, sponsor or underwriter provides to the hired NRSRO *either directly or by contracting with a third party.*

The same commenter suggested that the Commission clarify that information made available to the arranger-paid NRSRO must be made available to the other NRSROs not only at the same time but also in the same manner, and with same search, access and other capabilities, as it is made available to the arranger-paid NRSRO.[163] The Commission notes that the nature of the relationship between the arranger and the hired NRSRO makes it inappropriate to mandate that all arranger information is made available in the same manner to non-hired NRSROs. For example, the rule as amended does not prohibit arrangers from continuing to deliver written materials directly to the hired NRSROs while posting that material on their password-protected Internet Web site for other NRSROs to access. Nevertheless, a hired NRSRO's reliance on an arranger's representations would not be reasonable if the arranger provided the information to non-hired NRSROs in an impaired manner such that it impeded the ability of the non-hired NRSROs to develop and maintain a credit rating.

The Commission is making one additional change to the text of new paragraph (a)(3)(iii)(B) of Rule 17g–5 as proposed. As discussed above, that paragraph requires a hired NRSRO to obtain from the arranger a representation that it will provide access to its password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in new paragraph (e) of Rule 17g–5 (discussed below) that covers that calendar year. The Commission is revising the text of the amendment as proposed to clarify that the arranger, in the written representation it provides in the hired NRSRO, need only represent that it will provide access to its password-protected Internet Web site to a non-hired NRSROs whose certification indicates that it has either: (1) Determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to Rule 17g–5(a)(3) as amended in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or (2) has not accessed information pursuant to Rule 17g–5(a)(3) as amended 10 or more times in the most recently ended calendar year. This revision ensures that the representations that a hired NRSRO will be required to obtain from an arranger in order to rate a structured finance product will limit access to the arranger's password-protected Internet Web sites to non-hired NRSROs that have met the requirements set forth in the certification to be provided to the Commission pursuant to new paragraph (e) of Rule 17g–5 as amended.

The Commission is adopting new paragraph (a)(3)(iii) of Rule 17g–5 substantially as proposed, with the revisions to the text as proposed as discussed above.

D. Paragraph (e) of Rule 17g–5

The Commission also is adopting new paragraph (e) of Rule 17g–5 substantially as proposed. This provision requires that in order to access the Internet Web sites maintained by NRSROs and arrangers pursuant to the requirements of Rule 17g–5(a)(3), an NRSRO must annually execute and furnish to the Commission a certification stating the following:

> The undersigned hereby certifies that it will access the Internet Web sites described in 17 CFR § 240.17g–5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to 17 CFR § 240.17g–5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o–7(g)(1)) and 17 CFR § 240.17g–4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to 17 CFR § 240.17g–5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by

[159] *See February 2009 Proposing Release*, 74 FR at 6496.

[160] *See* Council Letter; DBRS Letter; Realpoint Letter.

[161] *See* Realpoint Letter.

[162] *See* Realpoint Letter.

[163] *See* Realpoint Letter.

the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to 17 CFR § 240.17g–5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in 17 CFR § 240.17g–5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to 17 CFR § 240.17g–5(a)(3) 10 or more times during the recently ended calendar year.[164]

The 10% threshold set forth in paragraph (e) of Rule 17g–5, as amended, is designed to require the NRSRO accessing arranger Internet Web sites to determine a meaningful amount of credit ratings without forcing it to undertake work that it may not have the capacity or resources to perform. The Commission expressed its belief in the *February 2009 Proposing Release* that there should be some minimum level of credit ratings issued to demonstrate that the NRSRO is accessing the information for the purpose of determining credit ratings. On the other hand, if an NRSRO accesses information about a proposed deal that involves a structure or a type of assets that are new and that the NRSRO has not developed a methodology to incorporate into its ratings, it would not be appropriate or prudent to require the NRSRO to determine a credit rating. The requirement that the NRSRO list the number of times it accessed the information for issued securities and money market instruments and the number of credit ratings determined using that information on its next annual certification pursuant to paragraph (e) is designed to provide a level of verification that the NRSRO is, in fact, accessing the information for purposes of determining credit ratings.

The Commission received five comments on proposed paragraph (e) of Rule 17g–5.[165] Two commenters argued that NRSROs accessing arranger information pursuant to the rule should be required to provide confidentiality agreements to the arranger.[166] The Commission is not requiring NRSROs accessing this information to enter into a confidentiality agreement with the arrangers. However, the Commission is sensitive to the concerns of commenters advocating such a requirement, namely that an arranger has a confidentiality agreement it could enforce directly itself. Accordingly, the representations an NRSRO must obtain from an arranger will not prevent the arranger from employing a simple process requiring non-hired NRSROs to agree to keep the information they obtain from the arranger confidential, provided that such a process does not operate to preclude, discourage, or significantly impede non-hired NRSROs' access to the information, or their ability to issue a credit rating based on the information. For example, an arranger could interpose a confidentiality agreement in a window (click-through screen) on the Internet Web site that appears after the NRSRO successfully enters its password to access the information and which requires the NRSRO to hit an ''Agree'' button before being directed to the information to be used to determine the credit rating. Presumably, this confidentiality agreement would contain the same terms as the confidentiality agreement between the arranger and the hired NRSRO. A process that effectively operates to preclude, discourage, or significantly impede non-hired NRSROs' access to the arranger's information or ability to issue unsolicited ratings, however, would be contrary to the Commission's purpose in adopting the rule as amended and, depending on the facts, may affect whether a hired NRSRO may reasonably rely on the arranger's representations.

The Commission also specifically requested comment as to whether the 10% threshold should be adjusted higher or lower.[167] Two commenters argued against the requirement,[168] with one stating that the 10% threshold could cause a chilling effect on NRSROs seeking to determine credit ratings using the arrangers' Internet Web sites and recommended that the Commission eliminate the provision and instead add a new provision to Rule 17g–2(a) requiring a non-hired NRSRO to make and retain records showing each deal it accessed pursuant to proposed rule 17g–5(a)(3).[169] The Commission continues to believe that a 10% threshold strikes an appropriate balance between ensuring that the NRSRO is accessing the information for the purpose of determining credit ratings and not requiring the NRSRO to determine credit ratings for proposed deals that, upon review of the information provided, is beyond the current capabilities of the NRSRO. NRSROs that choose to access arrangers' Internet Web sites should do so with the intent to generate credit ratings, in which case a 10% threshold should not have a chilling effect. Eliminating the threshold requirement could have the undesirable effect of encouraging NRSROs to access the arranger Internet Web sites for reasons other than determining ratings, which would run contrary to the Commission's purposes for amending the rule. However, the Commission intends to closely monitor the effect of the 10% threshold requirement.

The Commission also specifically requested comment on whether an NRSRO should be prohibited from accessing the arranger information in the future if it accesses information 10 or more times in a calendar year and does not determine credit ratings for 10% or more of the deals.[170] One commenter directly addressed this question and stated that the NRSRO should not be barred from accessing the information in the future.[171] The Commission believes that an NRSRO should be required to meet the 10% threshold to continue to access the information as this provides some evidence that the NRSRO is using the information for purposes of determining credit ratings and not for other reasons. At the same time, the Commission recognizes that there may be legitimate reasons why an NRSRO does not meet the 10% threshold in a given year, and NRSROs may request appropriate relief in such cases. For example, an NRSRO may access the information for a new type of financial instrument which it believed it was capable of rating but, upon reviewing the information posted by the arranger, determined that it did not have the resources or capacity to do so. In such a case, it would not be in the public interest for the non-hired NRSRO to produce a rating; nor, however, would it be desirable to penalize that NRSRO for its good-faith re-evaluation of its ability to produce the rating.

The Commission is revising the text of paragraph (e) to correct a typographical error contained in the *February 2009 Proposing Release* by removing the word ''the'' prior to the phrase ''such securities and money market instruments'' in the final sentence of the

[164] *See February 2009 Proposing Release*, 74 FR at 6496. The use of the term ''issued securities and money market instruments'' is intended to address potential deals that are posted on the Internet Web sites but that ultimately do not result in the publication of an initial rating because the arranger decides not to issue the securities or money market instruments. An NRSRO that accessed such information would not need to count it among the final deals that would be used to determine whether it met the 10% threshold. *See id.*

[165] *See* DBRS Letter; Fitch Letter; ASF/SIFMA Letter; Realpoint Letter; ABA Committee Letter.

[166] *See* ASF/SIFMA Letter; ABA Committee Letter.

[167] *See February 2009 Proposing Release*, 74 FR at 6497.

[168] *See* DBRS Letter, Realpoint Letter.

[169] *See* DBRS Letter.

[170] *See February 2009 Proposing Release*, 74 FR at 6497.

[171] *See* Realpoint Letter.

certification. Additionally, the Commission is revising the text of paragraph (e) to clarify that the limit on accessing information 10 or more times occurred during the most recently ended calendar year.

Accordingly, the Commission is adopting paragraph (e) of Rule 17g–5 substantially as proposed.

E. Regulation FD

The Commission is adopting, substantially as proposed, the amendments to Regulation FD.[172] The amendments to Regulation FD will accommodate the information disclosure program that the Commission is establishing under paragraphs (a) and (b) of Rule 17g–5, and permit the disclosure of material, non-public information to an NRSRO, solely for the purpose of allowing the NRSRO to determine or monitor a credit rating, irrespective of whether the NRSRO makes its ratings publicly available. As noted in the *February 2009 Proposing Release*, the amendments accommodate subscriber-based NRSROs that do not make their ratings publicly available for free, as well as NRSROs that access the information under Rule 17g–5 but ultimately do not issue a credit rating using the information.

Currently, Rule 100(b)(2)(iii) of Regulation FD [173] provides that the requirements of Regulation FD do not apply to disclosures of material non-public information made to an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available. As amended, Rule 100(b)(2)(iii) will contain two exceptions related to the issuance of credit ratings. Rule 100(b)(2)(iii)(A) of Regulation FD [174] will permit the disclosure of material, non-public information to an NRSRO, solely for the purpose of allowing the NRSRO to determine or monitor a credit rating pursuant to Rule 17g–5(a)(3), irrespective of whether the NRSRO makes its ratings publicly available. Rule 100(b)(2)(iii)(A) will apply only when the disclosures to NRSROs are made pursuant to Rule 17g–5(a)(3). Rule 100(b)(2)(iii)(B) of Regulation FD [175] will continue to permit issuers to disclose material, non-public information, solely for the purpose of determining or monitoring a credit rating, to any credit rating agency (including, but not limited to, NRSROs), as that term is defined in Section 3(a)(61) of the Exchange Act,[176] that makes its credit ratings publicly available.

The proposed amendment to Regulation FD elicited few comments. One commenter supported the proposed amendment, but suggested expanding it to expressly permit unsolicited NRSROs to contact an arranger with questions regarding the information provided, or to be provided, on its password-protected Internet Web site for purposes of determining or monitoring a credit rating, and to require arrangers to post on such Internet Web site any additional material information provided in response to such questions.[177] The Commission expects that arrangers will have an incentive to post any additional information provided to an NRSRO on its password-protected Internet Web site because if they do not do so, other NRSROs developing credit ratings by accessing the Internet Web site would be determining their credit ratings without the benefit of the additional information. A lack of access to this additional information could adversely impact the ratings and lead to more frequent rating actions during the surveillance process. The purpose of the amendment to Regulation FD is to assure arrangers that providing information in compliance with Rule 17g–5(a)(3) will not violate Regulation FD. The Commission believes that the amendment, as adopted, will permit arrangers to post such additional information without causing a violation of Regulation FD, and that no expansion of the amendment is necessary.

Another commenter agreed that the disclosure regime proposed under Rule 17g–5 cannot operate effectively without the proposed amendment to Regulation FD, but suggested that such an expansion of the credit rating agency exemption presents a risk that none of the ratings determined for a structured finance product would be publicly available.[178] To address this potential risk, this commenter suggested that the exception be revised to allow information provided under Rule 17g–5(a)(3) to be disclosed to all NRSROs, provided that the ratings of at least one of those NRSROs are publicly available. The Commission does not believe this revision is necessary. Because the disclosure regime in Rule 17g–5(a)(3) will be triggered only when credit ratings for structured finance products are paid for by the issuer, sponsor, or underwriter, the Commission believes it is already very likely that such ratings will be made publicly available.

Some NRSROs expressed concern that the proposed amendments would lead to a greater risk of selective disclosure of material, non-public information.[179] These commenters suggested that the proposed amendment to Regulation FD would hurt investor confidence in the fairness of U.S. markets,[180] encourage market abuse and undermine the integrity of the U.S. market.[181] In particular, these commenters noted that the proposed amendment to the credit rating agency exemption in Regulation FD would permit NRSROs to obtain material non-public information from issuers and then selectively disclose it, or selectively disclose rating actions based upon it.[182]

One commenter argued that the proposed amendment to Regulation FD would undercut the policy justification for including a credit rating agency exception in Regulation FD.[183] This commenter highlighted that the Commission's rationale for exempting disclosure to credit rating agencies from Regulation FD was the widely available publication of the resulting credit rating.[184]

The Commission is sensitive to commenters' concerns and will monitor the operation of the rule.[185] To aid the monitoring, the Commission encourages NRSROs and other market participants to notify the Commission if they believe the selective availability of non-public information is being abused. However, the Commission believes that the proposed amendments will not lead to misuse of material, non-public information by NRSROs. As noted above, the Commission believes that in order to promote competition in the credit rating industry NRSROs should

[172] 17 CFR 243.100–243.103.

[173] 17 CFR 243.100(b)(2)(iii).

[174] 17 CFR 243.100(b)(2)(iii)(A).

[175] 17 CFR 243.100(b)(2)(iii)(B).

[176] 15 U.S.C. 78c(a)(61).

[177] *See* Realpoint Letter.

[178] *See* DBRS Letter.

[179] *See* S&P Letter, Moody's Letter.

[180] *See* S&P Letter.

[181] *See* Moody's Letter.

[182] *See* Moody's Letter, S&P Letter.

[183] *See* S&P Letter.

[184] *See Selective Disclosure and Insider Trading,* Securities Act Release No. 7881 (August 15, 2000), 65 FR 51716 (August 24, 2000) (''Regulation FD Adopting Release''). In the Regulation FD Adopting Release the Commission explained that while it was aware that ''ratings organizations often obtain nonpublic information in the course of their ratings work'' it was not aware of any incidents of selective disclosure involving ratings organizations.

[185] Separately, the Commission reminds issuers and persons acting on their behalf of the need to consider whether information selectively disclosed under 17 CFR 243.100(b)(2)(iii)(A) or (B) also is required to be publicly disclosed in a registration statement, or periodic or current report, because disclosure of that information is necessary to make other statements made not misleading. In some circumstances, the fact that information is important to an NRSRO's analysis may be relevant to an issuer's evaluation of its other disclosure obligations.

have access to material, non-public information from arrangers for the purpose of determining or monitoring unsolicited credit ratings for structured finance products. Because the Regulation FD exclusion added today is limited to NRSROs accessing the information in the context of Rule 17g–5(a)(3), entities receiving the material, non-public information will be subject to Section 15E(g) of the Exchange Act [186] and Rule 17g–4 [187] thereunder. These statutory and regulatory provisions require NRSROs to establish, maintain and enforce policies and procedures reasonably designed to prevent the misuse of material, non-public information.

Moreover, an NRSRO will be required to furnish to the Commission prior to accessing a password-protected Internet Web site a certification under Rule 17g–5(e) that the NRSRO will keep the information it accesses pursuant to Rule 17g–5(a)(3) confidential and treat it as material, non-public information subject to its Section 15E(g) and Rule 17g–4 obligations. In addition, the disclosure regime in Rule 17g–5 will only be triggered when an issuer pays an NRSRO to issue or maintain a credit rating for a structured finance product. As a result, the Commission expects that a credit rating for such structured finance product will be issued publicly along with any unsolicited ratings from subscriber-based NRSROs.

In addition, the Commission is amending Rule 100(b)(2)(iii) to replace ''developing'' with ''determining or monitoring[.]'' This amendment to Rule 100(b)(2)(iii) is intended to mirror the use of ''determining'' in the Rating Agency Act [188] and other Commission rules regarding NRSROs.[189] The Commission also notes that this amendment will be consistent with the Rule 17g–5(e) certification that NRSROs will be required to furnish to the Commission and to arrangers in order to access an arranger's password-protected Internet Web site described in Rule 17g–5(a)(3). New Rule 17g–5(e) requires NRSROs to certify that the NRSRO will access the arranger's password-protected Internet Web site described in Rule 17g–5(a)(3) solely for the purpose of ''determining or monitoring'' credit ratings.

The Commission is also adopting, as proposed, the amendment to the text in Rule 100(b)(2)(iii)(B) of Regulation FD [190] to use the statutory definition of ''credit rating agency'' as defined in Section 3(a)(61) of the Exchange Act.[191] The Commission received one comment on this proposed amendment, which supported it.[192]

F. Conclusion

The Commission is adopting these amendments to Rule 17g–5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[193] The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.[194] The Commission believes that the amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate these instruments.

The Commission believes that these amendments will advance the Rating Agency Act's goal of promoting competition in the credit rating industry by facilitating the issuance of credit ratings by NRSROs that are not hired by the arranger. The Commission further believes that the resulting increase in the number of ratings extant for a given structured finance security or money market instrument will provide users of credit ratings with more views on the creditworthiness of the security or money market instrument. The amendments also are designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. By facilitating the issuance of unsolicited ratings by non-hired NRSROs, the amendments will increase the likelihood that if a hired NRSRO issues a ratings that is higher than warranted, that fact will be revealed to the market through the lower ratings issued by other NRSROs.

For the reasons discussed above, the Commission is adopting the amendments to Rule 17g–5 and Regulation FD substantially as proposed.

IV. Paperwork Reduction Act

Certain provisions of the rule amendments contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA''). The Commission published a notice requesting comment on the collection of information requirements in the *February 2009 Proposing Release* and submitted the proposed collection to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[195] An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

(1) Rule 17g–2, Records to be made and retained by nationally recognized statistical rating organizations (OMB Control Number 3235–0628); and

(2) Rule 17g–5, Conflicts of interest (OMB Control Number 3235–0649).

The amendment to Regulation FD does not contain a collection of information within the meaning of the PRA.

A. Collections of Information Under the Proposed Rule Amendments

The Commission is adopting rule amendments to impose additional disclosure and conflict of interest requirements on NRSROs. These amendments are designed to address concerns about the integrity of the credit rating procedures and methodologies at NRSROs and to promote transparency and objectivity in the NRSRO credit rating process by, among other things, increasing competition and making it easier for investors and other market participants and observers to assess the credit ratings performance of NRSROs. These amendments modify the Commission's rules, adopted in June 2007 and modified in February 2009, implementing registration, recordkeeping, financial reporting, and oversight rules under the Rating Agency Act. The amendments contain recordkeeping and disclosure requirements that are subject to the PRA.

In summary, the rule amendments require: (1) An NRSRO to make publicly available on its Internet Web site in an interactive data file that uses any machine-readable computer format (until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission's List of XBRL Tags for NRSROs) ratings action histories for all credit ratings initially determined on or after June 26, 2007, with each new ratings action that is related to issuer-

[186] 15 U.S.C. 78o–7(g).

[187] 17 CFR 240.17g–4.

[188] *See, e.g.,* 15 U.S.C. 78o–7(a)(1)(B)(ii).

[189] *See, e.g.,* 17 CFR 240.17g–2.

[190] 17 CFR 243.100(b)(2)(iii)(B).

[191] 15 U.S.C. 78c(a)(61).

[192] *See* ABA Letter.

[193] 15 U.S.C. 78o–7(h)(2).

[194] *Id.*

[195] *See February 2009 Proposing Release,* 74 FR 6498–6501.

paid credit ratings to be reflected in such publicly disclosed histories no later than twelve months after it was taken, and each new ratings action that is related to credit ratings that are not issuer-paid to be reflected in such publicly disclosed histories no later than twenty-four months after it was taken;[196] (2) an NRSRO that is hired by arrangers to issue credit ratings for structured finance products to disclose the deals for which they are in the process of determining such credit ratings to non-hired NRSROs that have furnished the Commission with the certification as described below; (3) an NRSRO that is hired by arrangers to perform credit ratings for structured finance products to obtain written representations from arrangers, on which the NRSRO can reasonably rely, that the arrangers will provide all the information given to the hired NRSRO to non-hired NRSROs that have furnished the Commission with the certification described below;[197] and (4) an NRSRO seeking to access the information maintained by the NRSROs and the arrangers pursuant to the amended rules to furnish the Commission an annual certification that it is accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using that information.[198]

B. Proposed Use of Information

The amendments enhance the framework for Commission oversight of NRSROs. As the Commission noted in the *February 2009 Proposing Release,*[199] the collections of information in the amendments are designed to provide users of credit ratings with information upon which to evaluate the performance of NRSROs and to enhance the accuracy of credit ratings for structured finance products by increasing competition among NRSROs who rate these products.

C. Respondents

In the *June 2007 Adopting Release,* the Commission estimated that approximately 30 credit rating agencies would be registered as NRSROs.[200] Since the initial set of rules under the Rating Agency Act became effective in June 2007, ten credit rating agencies have registered with the Commission as NRSROs.[201] The Commission, however, expects additional entities will register. The Commission received no comments on this estimate. The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the amendments.

In addition, under the amendments to paragraphs (a) and (b) of Rule 17g–5, NRSROs that are hired to rate structured finance products will be required to obtain representations from arrangers that the arrangers will provide information given to the hired NRSRO to other NRSROs. In the *June 2008 Proposing Release* and again in the *February 2009 Proposing Release,* based on staff information gained from the NRSRO examination process, the Commission estimated that approximately 200 arrangers would be respondents for the purpose of the PRA estimate.[202] The Commission received no comments on this estimate when originally proposed or re-proposed. The Commission continues to estimate, for purposes of this PRA, that approximately 200 arrangers will be affected.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the amendments will be approximately 71,550 hours on a one-time basis[203] and 169,390 hours on an annual basis.[204] This represents an increase from the estimates of 69,315 hours on a one-time basis and 169,045 hours on an annual basis set forth in the *February 2009 Proposing Release.*[205] This increase is attributable in part to the fact that the amendments to Rule 17g–2(d) as adopted apply to all NRSROs, rather than only to NRSROs operating under the issuer-paid business model as proposed. The increase also reflects additional burdens, as described in detail below.

The total annual and one-time hour burden estimates for NRSROs described below are averages across all types of NRSROs expected to be affected by the amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. The Commission notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Amendments to Rule 17g–2

Rule 17g–2 requires an NRSRO to make and keep current certain records relating to its business and requires an NRSRO to preserve those and other records for certain prescribed time periods.[206] The amendments to paragraph (d) of Rule 17g–2 require an NRSRO to make publicly available on its Internet Web site in an interactive data file that uses a machine-readable computer format ratings action histories for all credit ratings initially determined on or after June 26, 2007, with each new ratings action to be reflected in such publicly disclosed histories no later than twelve months after it was taken for ratings actions related to issuer-paid credit ratings and twenty-four months after it was taken for ratings actions related to credit ratings that are not issuer-paid. An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission's List of XBRL Tags for NRSROs.[207]

The Commission requested comment in the *February 2009 Proposing Release* on all aspects of the burden estimates for the proposed amendments to Rule 17g–2(d) and received none.

In the *February 2009 Adopting Release,* the Commission determined that, in order to implement the Rule 17g–2(d) requirement that an NRSRO make public, in XBRL format and with a six-month grace period, the ratings action histories required under paragraph (a)(8) for a random sample of 10% of the credit ratings for each ratings class for which it has issued 500 or

[196] *See* 17 CFR 240.17g–2(d)

[197] *See* 17 CFR 240.17g–5(a)(3) and (b)(9).

[198] *See* 17 CFR 240.17g–5(e).

[199] *See February 2009 Proposing Release,* 74 FR at 6498.

[200] *See June 2007 Adopting Release,* 72 FR at 33607.

[201] A.M. Best Company, Inc.; DBRS Ltd.; Fitch, Inc.; Japan Credit Rating Agency, Ltd.; Moody's Investors Service, Inc.; Rating and Investment Information, Inc.; Standard & Poor's Ratings Service; LACE Financial Corp.; Egan-Jones Rating Company; and Realpoint LLC.

[202] *See June 2008 Proposing Release,* 73 FR at 36237; *February 2009 Proposing Release,* 74 FR at 6498.

[203] This total is derived from the total one-time hours set forth, in the order in which they are set forth, in the text below: 2,550 + 9,000 + 60,000 = 71,550.

[204] This total is derived from the total annual hours set forth, in the order in which they are set forth, in the text below: 450 + 14,880 + 4,000 + 150,000 + 60 = 169,390.

[205] *February 2009 Proposing Release,* 74 FR at 6498–6499.

[206] 17 CFR 240.17g–2.

[207] 17 CFR 240.17g–2(d)(iii).

more issuer-paid credit ratings, an NRSRO subject to the requirements will spend, on average, approximately 30 hours to publicly disclose the rating action histories in XBRL format and, thereafter, 10 hours per year to update this information.[208] In the *February 2009 Proposing Release,* the Commission estimated, based on staff experience, that the proposed amendments to Rule 17g–2(d) requiring NRSROs to publicly disclose ratings action histories of all issuer-paid credit ratings would increase by 50% the estimated hour burdens for the disclosure requirements of paragraph (d) of Rule 17g–2 as adopted at that time.[209] Therefore, the Commission estimated that the one time annual hour burden for each NRSRO affected by the rule would increase from 30 hours to 45 hours[210] and the annual hour burden would increase from 10 hours to 15 hours.[211] Although the Commission based its estimates for individual NRSROs' hour burdens of Rule 17g–2(d) as proposed on the assumption that the requirements of the rule would apply only to issuer-paid credit ratings, the Commission believes that the estimates are valid for NRSROs operating under the subscriber-paid business model, all of which already have an Internet Web site, as well.[212]

The Commission notes the *February 2009 Proposing Release* contemplated that NRSROs would provide the information in XBRL when it determined its estimates. The Commission does not believe that requiring the information to be disclosed initially in any machine readable format alters those burden estimates because we believe the steps to be taken are quite similar. The Commission also notes that currently seven NRSROs are providing the disclosure required pursuant to Rule 17g–2(d) (or the 10% requirement) in machine-readable format. The Commission does believe that there will be an hour burden associated with transitioning from disclosing the information in a machine-readable format into an XBRL format. Specifically, the Commission estimates that this hour burden will be approximately 40 hours per NRSRO. This estimate is based on Commission's staff experience regarding cost associated with XBRL programming. The 40 hours estimate includes time for the appropriate staff of the NRSRO[213] to research and become familiar with the List of XBRL Tags, map the information disclosed in the machine-readable format to the XBRL taxonomy and conduct initial testing.

Accordingly, the Commission estimates that the total aggregate one-time burden for NRSROs to make their ratings histories publicly available initially in machine-readable interactive format, and the one-time burden to transition the disclosure of information from machine-readable to XBRL will be approximately 2,550 hours,[214] and the total aggregate annual burden hours will be approximately 450 hours.[215] This represents an increase from the estimates of 210 hours on a one-time basis and 70 hours on an annual basis set forth in the *February 2009 Proposing Release.*[216] This increase is attributable to the fact that the amendments to Rule 17g–2(d) as adopted apply to all NRSROs, rather than only to NRSROs operating under the issuer-paid business model as originally proposed.

2. Amendments to Rule 17g–5

Rule 17g–5 requires an NRSRO to manage and disclose certain conflicts of interest[217] and prohibits certain other types of conflicts of interest outright.[218] The amendments to Rule 17g–5 add an additional conflict to paragraph (b) of Rule 17g–5 for NRSROs to manage: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[219] The amendments to paragraph (a) of the rule further specify that an NRSRO subject to this conflict is prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed or arranged to be disclosed by the NRSRO. Specifically, the amendments require an NRSRO that is hired by arrangers to perform credit ratings for structured finance products to disclose to other NRSROs the deals for which it is in the process of determining such credit ratings and to obtain written representations from arrangers that the arrangers will provide the same information given to the hired NRSRO to other NRSROs. An NRSRO rating such products will need to disclose to other NRSROs the following information on a password protected Internet Web site: A list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of Rule 17g–5 as amended can be accessed.[220]

The Commission estimated in the *February 2009 Proposing Release* that it would take an NRSRO approximately 300 hours to develop a system, as well as policies and procedures, for the disclosures required.[221] This estimate was based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.[222] In addition to the estimated one-time hour burden, the amendments will result in an annual hour burden to the NRSRO arising from the requirement to make disclosures for each deal being rated. Based on staff experience, the Commission estimated that it would take approximately 1 hour per transaction for an NRSRO to update the lists maintained on its password protected Internet Web sites.[223]

In the *February 2009 Proposing Release,* the Commission repeated its estimate, originally set forth in the *June 2008 Proposing Release,*[224] that a large NRSRO would have rated approximately 2,000 new RMBS and CDO transactions in a given year. The

[208] The Commission also based this estimate on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO. No alternatives to these estimates as proposed were suggested by commenters and the Commission adopted these hour burdens. *See February 2009 Adopting Release,* 74 FR at 6472.

[209] *See February 2009 Proposing Release,* 74 FR at 6499.

[210] 50% of 30 hours = 15 hours + 30 hours = 45 hours.

[211] 50% of 10 hours = 5 hours + 10 hours = 15 hours.

[212] *See February 2009 Proposing Release,* 74 FR at 6499.

[213] The Commission believes a Senior Programmer would be tasked to perform the transition of disclosing the information in machine-readable format to XBRL.

[214] 45 hours × 30 NRSROs = 1,350 hours, plus the one time burden to change from machine readable format to XBRL of 40 hours × 30 NRSROs = 1,200 hours; for a total one-time burden of 1,350 + 1,200 = 2,550.

[215] 15 hours × 30 NRSROs = 450 hours.

[216] *February 2009 Proposing Release,* 74 FR at 6499.

[217] 17 CFR 240.17g–5(a) and (b).

[218] 17 CFR 240.17g–5(c).

[219] 17 CFR 240.17g–5(b)(9).

[220] Paragraph (a)(3)(i) of Rule 17g–5.

[221] *See February 2009 Proposing Release,* 74 FR at 6500.

[222] *See June 2007 Adopting Release,* 72 FR at 33609.

[223] *See February 2009 Proposing Release,* 74 FR at 6500.

[224] *See June 2008 Proposing Release,* 73 FR at 36240.

Commission based this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs which rated structured finance transactions. The Commission adjusted this number to 4,000 transactions in order to account for other types of structured finance products, including commercial real estate MBS and other consumer assets.[225] As noted in the *February 2009 Proposing Release,* the Commission recognizes that the number of new structured finance transactions has dropped precipitously since 2006 because of the credit market turmoil. Nonetheless, to account for future market developments, which is a more conservative approach, the Commission retained the estimate that a large NRSRO will rate 4,000 new deals per year.[226] The Commission received no comments on the estimate.

Based on the number of outstanding structured finance ratings submitted by the ten registered NRSROs on their Form NRSROs, the Commission estimated that the three largest NRSROs account for 97% of the market for structured finance ratings. As explained in greater detail in the *February 2009 Proposing Release,* the Commission used that estimate of market share to estimate that the total structured finance ratings issued by all NRSROs in a given year would be 14,880.[227]

The Commission requested comment on its burden estimates for the proposed amendments to Rule 17g–5(a) and (b) and received one comment from a large NRSRO arguing that the Commission significantly underestimated the initial and recurring burdens associated with the proposed amendments.[228] Specifically, the commenter argued that developing the software and password-protected Internet Web page could require a thousand, if not thousands, of hours of work and that the development of policies and procedures and controls to implement the requirement could take at least a thousand hours, and that developing a training module and training affected staff could take at least 500 hours. The commenter further stated that it may take one to two hours per transaction to update the NRSRO Web site, depending on the frequency with which key data change during the rating process.[229]

The Commission is sensitive to the potential burdens imposed on NRSRO by these new disclosure requirements. However, based on staff experience, the Commission does not believe the cost will result in the burdens estimated by the sole commenter expressing disagreement with the Commission's original estimates. As previously noted, all of the NRSROs currently maintain Internet Web sites, in most cases with password-protected portals that their subscribers and registered users can access to obtain information posted by the NRSRO. The Commission believes that adding a portal for other NRSROs to access pending deal information should not require significant additional Internet Web site design and maintenance.

Consistent with the estimates set forth in the *February 2009 Proposing Release,*[230] the Commission believes, based on staff experience, that an NRSRO will take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the new requirements of Rule 17g–5(a)(3)(i) and (ii), resulting in a total one-time hour burden of 9,000 hours for 30 NRSROs.[231] The Commission further believes that based on its estimates that the total structured finance ratings issued by all NRSROs in a given year would be 14,880 and that it will take each NRSRO affected by the rule approximately 1 hour per transaction for the NRSRO to update the lists maintained on the NRSROs' password protected Internet Web sites, the total annual hour burden for the industry will be 14,880 hours.[232]

New paragraph (a)(3)(iii) of Rule 17g–5 requires that an NRSRO hired to rate a structured finance product obtain from the arranger a written representation on which it can reasonably rely that it will disclose the following information on a password-protected Internet Web site at the same time the information is provided to the NRSRO:

- All information the arranger provides to the NRSRO for the purpose of determining the initial credit rating for the security or money market instrument, including information about characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument; and
- All information the arranger provides to the NRSRO for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument.[233]

In the *February 2009 Proposing Release,* the Commission estimated that there would be approximately 200 arrangers affected by the proposed new paragraph (a)(iii) of Rule 17g–5 and that it would take each arranger approximately 300 hours to develop a system, including policies and procedures, for the disclosures.[234] These estimates were based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.[235] The Commission further noted that in addition to this one-time hour burden, the proposed amendments would result in an annual hour burden for arrangers arising from the disclosure of information on a transaction-by-transaction basis each time an initial rating process is commenced. The Commission estimated, based on staff experience and the estimate of 4,000 new structured finance deals per year as discussed above, that each respondent would disclose information for approximately 20 new transactions per year[236] and that it would take approximately 1 hour per transaction to post the information to its password-protected Internet Web sites. The Commission noted that the number of new transactions per year would vary by the size of issuer, with larger respondents perhaps arranging in excess of 20 new deals per year and smaller arrangers perhaps initiating less. The estimate of 20 new deals per year is therefore an average across all respondents.[237] Based on this analysis, the Commission estimated that it would take a respondent approximately 20 hours[238] to disclose this information, on an annual basis, for a total aggregate annual hour burden of 4,000 hours.[239] The Commission received no comments on this estimate, nor did the Commission receive any comments on an identical burden estimate in the original proposing release.

In addition, Rule 17g–5(a)(3)(iii)(D) requires that an NRSRO hired to rate a structured finance product obtain from the arranger a written representation on which it can reasonably rely that the

[225] *See February 2009 Proposing Release,* 74 FR at 6500.

[226] *Id.*

[227] *Id.*

[228] *See* Moody's Letter.

[229] *See* Moody's Letter.

[230] *See February 2009 Proposing Release,* 74 FR at 6500.

[231] 300 hours × 30 NRSROs = 9,000 hours.

[232] 14,880 ratings × 1 hour = 14,880 hours.

[233] Paragraph (a)(3)(iii) of Rule 17g–5.

[234] *See February 2009 Proposing Release,* 74 FR at 6500.

[235] *See June 2007 Adopting Release,* 72 FR at 33609.

[236] 4,000 new transactions/200 issuers = 20 new transactions per issuer.

[237] *See February 2009 Proposing Release,* 74 FR at 6501.

[238] 20 transactions × 1 hour = 20 hours.

[239] 20 hours × 200 respondents = 4,000 hours.

arranger will disclose the information it provides to the hired NRSRO to be used for credit rating surveillance on a security or money market instrument on a password-protected Internet Web site at the same time the information is provided to the hired NRSRO. Because surveillance covers more than just initial ratings, the Commission estimated, in the *June 2008 Proposing Release* and the *February 2009 Proposing Release,* based on staff information gained from the NRSRO examination process, that monthly disclosure would be required with respect to approximately 125 transactions on an ongoing basis.[240] Also based on staff information gained from the NRSRO examination process, the Commission estimated that it would take a respondent approximately 0.5 hours per transaction to disclose the information.[241]

The Commission requested comment in the *February 2009 Proposing Release* on all aspects of its estimates for the amount of time arrangers would spend complying with the requirements of proposed paragraph (a)(3)(iii) of Rule 17g–5. The Commission did not receive any comments in response to this request.

Accordingly, the Commission believes, based on its estimate that an arranger will take approximately 300 hours on a one-time basis to implement a disclosure system consistent with the representations to be made pursuant to new paragraph (a)(3)(iii) of Rule 17g–5, that the total one-time hour burden for arrangers will be 60,000 hours.[242] The Commission further believes, based on its estimate of an average of 125 ongoing transactions each month and 30 minutes spent on the monthly disclosure for each transaction, that each respondent will spend approximately 750 hours [243] on an annual basis disclosing information consistent with the representations to be made pursuant to new paragraph (a)(3)(iii) of Rule 17g–5, for a total aggregate annual burden of 150,000 hours.[244]

An NRSRO that wishes to access information on another NRSRO's Internet Web site or on an arranger's Internet Web site pursuant to Rule 17g–5(a)(3) as amended is required to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g–5. In the *February 2009 Proposing Release,* the Commission estimated that this annual certification would become a matter of routine over time and should take less time than it takes an NRSRO to submit its annual certification under Rule 17g–1(f).[245] The annual certification required under Rule 17g–1(f) involves the disclosure of substantially more information than the certification in proposed paragraph (e) of Rule 17g–5. The Commission estimated that it will take an NRSRO approximately 10 hours to complete the Rule 17g–1(f) annual certification.[246] Given that the paragraph (e) certification requires much less information, the Commission estimated, based on staff experience, that it would take an NRSRO approximately 20% of the time it takes to do the Rule 17g–5 annual certification, or 2 hours.[247] The Commission assumed that all 30 NRSROs ultimately registered with the Commission would complete the certification. The Commission requested comment on this estimate but did not receive any. Accordingly, the Commission estimates it will take an NRSRO approximately 2 hours to complete the proposed paragraph (e) certification for an aggregate annual hour burden to the industry of 60 hours.[248]

To comply with the requirement under Rule 17g–5(a)(3)(iii) that it obtain from the issuer, sponsor or underwriter a written representation that reasonably can be relied upon, an NRSRO likely will include such a representation in the standardized contract it uses in each transaction the NRSRO contracts to rate. The Commission notes that the Rule 17g–5(a)(3)(iii) includes representations an NRSRO is required to obtain from an arranger. The Commission expects an NRSRO's in-house attorney to draft the representations based on this text, which will be inserted into the NRSRO's existing standardized contracts. Based on staff experience, the Commission estimates that there will be a one-time burden of five hours for this language to be drafted, negotiated and added to the NRSRO's standardized contract. This estimate is based in part on the two hour burden estimate that the Commission believes would result from an NRSRO completing the certification required under paragraph (e) of Rule 17g–5. However, the added hours reflect the additional time needed to draft the representations because the specific language is not included in the rule. Therefore, there will be a total one-time aggregate hour burden of 150 hours.[249]

E. Collection of Information Is Mandatory

The recordkeeping and notice requirements for the amendments are mandatory for credit rating agencies that choose to register as NRSROs with the Commission.[250]

F. Confidentiality

The disclosures required under the amendments to Rule 17g–2(d) will be public. Pursuant to the representations an NRSRO hired to rate a structured finance product is required to obtain under the amendments to Rule 17g–5, arrangers will make the information they provide to the hired NRSRO available to other NRSROs. Pursuant to Rule 17g–5(e), the NRSROs are required to provide certifications to the Commission agreeing to keep the information they access under Rule 17g–5(a)(3) confidential.

The information an NRSRO posts on its Internet Web site pursuant to Rule 17g–5(a)(3)(i) and (ii) will be available only to NRSROs that have provided to the NRSRO that posts the information a certification that was furnished to the Commission pursuant to subparagraph (e). The representations made by the arranger and provided to the NRSRO will not be made public, unless the NRSRO or arranger chooses to make them public. All documents maintained by an NRSRO are subject to inspection by representatives of the Commission. The Commission will not make public the certifications provided by NRSROs pursuant to subparagraph (e). NRSROs will also provide copies of their certifications to arrangers when accessing arranger Web sites. Arrangers are not expected to make these certifications public.

V. Costs and Benefits of the Amended Rules

The Commission is sensitive to the costs and benefits that result from its rules. In the *February 2009 Proposing Release,* the Commission identified certain costs and benefits of the amendments and requested comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in the analysis.[251] The Commission

[240] *See infra* note 286 and accompanying text.

[241] *See June 2008 Proposing Release,* 73 FR at 36240; *February 2009 Proposing Release,* 74 FR at 6500.

[242] 300 hours × 200 respondents = 60,000 hours.

[243] 125 transactions × 30 minutes × 12 months = 45,000 minutes/60 minutes = 750 hours.

[244] 750 hours × 200 respondents = 150,000 hours.

[245] 17 CFR 240.17g–1(f). *See February 2009 Proposing Release,* 74 FR at 6501.

[246] *See June 2007 Adopting Release,* 72 FR at 33609.

[247] 20% of 10 hours = 2 hours.

[248] 2 hours × 30 NRSROs = 60 hours.

[249] 5 hours × 30 NRSROs = 150 hours.

[250] *See* Section 15E of the Exchange Act (15 U.S.C. 78o–7).

[251] For the purposes of the cost/benefit analysis set forth in the *February 2009 Proposing Release,*

Continued

sought comment and data on the value of the benefits identified. The Commission also solicited comments on the accuracy of its cost estimates in each section of this cost-benefit analysis, and requested commenters to provide data so the Commission could improve the cost estimates, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission requested estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of the rule amendments.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.[252] As the Senate Report states, the Rating Agency Act establishes ''fundamental reform and improvement of the designation process'' with the goal that ''eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs.'' [253]

The amendments are designed to improve the transparency of credit ratings performance and promote competition by making histories of credit ratings actions publicly available and creating a mechanism for NRSROs to determine unsolicited credit ratings for structured finance products.

The amendments to Rule 17g–2(d) require NRSROs to publicly disclose all of their ratings actions histories for credit ratings in an interactive data file that uses a machine-readable computer format either with a twelve month or twenty-four month grace period, depending on whether the credit rating was issuer-paid or not. An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission's List of XBRL Tags for NRSROs. This disclosure will allow the marketplace to better compare the performance of NRSROs determining credit ratings. The Commission believes that making this information publicly available will benefit users of credit ratings by providing them with useful metrics with which to compare NRSROs. The Commission also notes that the 100% requirement will be useful to market participants and observers within a short period of the rule being effective as the vast majority will be available at twelve months.

Analyzing ratings history information for outstanding credit ratings is the most direct means of comparing the performance of two or more NRSROs. The access to ratings history data provided by the rule as amended will facilitate the ability of users of credit ratings to compare how each NRSRO that maintains a credit rating for a particular obligor or debt instrument initially rated the instrument and, thereafter, how and when it adjusted its credit rating over time. This will provide the benefit of allowing the person reviewing the credit rating histories of the NRSROs to reach conclusions about which NRSROs did the best job in determining an initial rating and, thereafter, making appropriate and timely adjustments to the credit rating. Increased disclosure of ratings history for credit ratings will make the performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job assessing creditworthiness. This may cause users of credit ratings to give greater weight to credit ratings of NRSROs that distinguish themselves by a better history of credit rating performance than their peers. Moreover, to the extent this improves the quality of the credit ratings, persons that use credit ratings, for example, to make investment or lending decisions will have better information upon which to base their decisions.

In addition to facilitating the ability of individual comparisons of NRSRO ratings performance, the Commission believes the ratings history disclosures will enable market observers and participants to generate statistics about NRSRO performance by compiling and processing the information in the aggregate. The ratings history disclosure requirements adopted today will facilitate the ability of market observers and participants and other users of credit ratings to complement the standardized performance metrics disclosure required under Commission rules by designing their own performance metrics in order to generate the performance statistics most meaningful to them. Specifically, the raw data to be provided by NRSROs will allow market participants to develop performance measurement statistics that would supplement those required to be published by the NRSROs themselves in Exhibit 1 to Form NRSRO, tapping into the expertise of credit market observers and participants in order to create better and more useful means to compare the performance of NRSROs. In addition, the Commission believes that the new disclosure requirements will provide the benefit of fostering greater accountability for NRSROs as well as promoting competition among NRSROs by making it easier for users of credit ratings to analyze the actual performance of credit ratings in terms of accuracy (as defined by each individual user of credit ratings) in assessing creditworthiness, regardless of the business model under which an NRSRO operates. These disclosures may also enhance competition by making it easier for smaller and less established NRSROs to develop proven track records of determining accurate credit ratings.

As discussed above and below in the cost discussion, the Commission recognizes that the amended rule may negatively affect the revenues of NRSROs. Nevertheless, as explained in greater detail above, the Commission believes that the amended rule, as adopted, strikes an appropriate balance between providing users of credit ratings, investors, and other market participants and observers with a sufficient volume of raw data with which to gauge the performance of different NRSROs' ratings over time while at the same time addressing concerns raised by NRSROs regarding their ability to derive revenue from granting market participants access to their credit ratings and downloads of their credit ratings. In particular, by providing 100% of credit ratings

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the Commission used salary data from the Securities Industry and Financial Markets Association (''SIFMA'') *Report on Management and Professional Earnings in the Securities Industry 2007,* which provides base salary and bonus information for middle-management and professional positions within the securities industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. The salary costs derived from the report and referenced in this costs and benefits section, are modified to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. Hereinafter, references to data derived from this SIFMA report as modified in the manner described above will be cited as *SIFMA 2007 Report as Modified.* For the purposes of this costs and benefits section, the Commission is using updated salary data from SIFMA's *Management and Professional Earnings in the Securities Industry 2008* with similar modifications. Hereinafter, references to data derived from the most recent SIFMA report as modified in the manner described above will be cited as *SIFMA 2008 Report as Modified.*

[252] *Senate Report,* p. 2.

[253] *Id.* p. 7.

histories for ratings initially determined after June 26, 2007, the rule as amended will over time provide a robust data set for users of credit ratings, investors, and other market participants and observers.

At the same time, the Commission believes that the twenty-four month grace period before a credit rating action that is not issuer-paid is required to be disclosed, as well as requiring only the disclosure of the credit ratings and not any analysis or report accompanying the publication of a rating, will not lead to significant or undue lost revenues to NRSROs operating under the subscriber-paid business model. Additionally, the Commission believes that the disclosure of a credit rating action that is issuer-paid on a twelve month delayed basis also will not lead to undue lost revenue. As noted previously, the Commission understands that the revenue derived from payments for downloads of their ratings represents a relatively small percentage of their total net revenue. The rule does not require an NRSRO to disclose any analysis or report along with the rating history. Therefore, the Commission does not believe the fees that NRSROs derive from selling their analysis along with their ratings will be significantly impacted. Further, the ability to receive data on a ratings action twenty-four months after it takes place would not appear to be an adequate substitute for subscribing to an NRSRO's current credit ratings, nor would the ability to download credit ratings that are twelve months old be a substitute for downloading current credit ratings.

The amendments to paragraphs (a) and (b) of Rule 17g–5 require NRSROs that are paid by arrangers to determine credit ratings for structured finance products to maintain a password-protected Internet Web site that lists each deal they have been hired to rate. They also will be required to obtain written representations from the arranger hiring the NRSRO, on which the NRSRO can reasonably rely, that the arranger will post all information provided to the NRSRO to determine the rating and, thereafter, to monitor the rating on a password protected Internet Web site. NRSROs not hired to determine and monitor the ratings will then be able to access the NRSRO Internet Web sites to learn of new deals being rated and access the arranger Internet Web sites to obtain the information being provided by the arranger to the hired NRSRO during the initial rating process and, thereafter, for the purpose of surveillance. However, the ability of NRSROs to access these NRSRO and arranger Internet Web sites will be limited to NRSROs that certify to the Commission on an annual basis, among other things, that they are accessing the information solely for the purpose of determining or monitoring credit ratings, that they will keep the information confidential and treat it as material non-public information, and that they will determine credit ratings for at least 10% of the deals for which they obtain information if they access such information for ten or more structured finance products in the calendar year covered by the certification. They are also required to disclose in the certification the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the year covered by their most recent certification, or, alternatively that they previously had not accessed such information ten or more times in the most recently ended calendar year.

The Commission is adopting these amendments to Rule 17g–5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.[254] These provisions provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.[255] The amendments are designed to address conflicts of interest and improve competition and the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products. Generally, the information relied on by the hired NRSROs to rate structured finance products is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (*i.e.,* NRSROs that are subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The Commission's goal is to increase the number of ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of ratings by NRSROs that are not hired by the arranger. This will provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument than is currently available. The amendments are also designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to more NRSROs, the amendments may make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the ratings issued by other NRSROs.

As discussed in detail above, the Commission recognizes that the amendments to Rule 17g–5 will increase the number of credit ratings available to investors by increasing the number of NRSROs issuing those ratings, thereby potentially giving arrangers a broader pool of NRSROs among which to ''shop'' for a rating. The Commission also recognizes the concern that NRSROs not hired by the arranger might have the incentive to use information accessed pursuant to Rule 17g–5 as amended to issue an unduly favorable rating in an attempt to procure future business from a particular arranger. The Commission believes that there are several factors counteracting this incentive. First, the 100% disclosure requirement set forth in Rule 17g–2(d), as amended, will facilitate users of credit ratings to compare the credit rating performance of all NRSROs issuing a credit rating for a given structured finance product, whether the NRSROs are hired by the arranger to do so or instead are issuing unsolicited ratings based on information obtained under the provisions of Rule 17g–5 as amended. This will likely enhance both hired and non-hired NRSRO's accountability for the ratings they issue. Second, the information disclosed pursuant Rule 17g–5 will be available to all NRSROs, including NRSROs operating under the subscriber-paid model. Since the latter are not compensated by the structured products' arrangers, they can issue unsolicited ratings without the pressure of worrying about the effect that the unsolicited ratings might have on their future revenue stream from arrangers of structured finance. Finally, by facilitating the issuance of unsolicited ratings, the amendments to Rule 17g–5 may serve to mitigate the potential for ratings shopping, since an arranger that ''shopped'' in order to obtain a higher rating would still face the possibility of non-hired NRSROs issuing lower ratings.

The Commission generally requested comment on all aspects of the benefits

[254] 15 U.S.C. 78o–7(h)(2).

[255] *Id.*

of the amendments as proposed.[256] In addition, the Commission requested specific comment on the available metrics to quantify these benefits and any other benefits the commenter may identify, including the identification of sources of empirical data that could be used for such metrics. The Commission did not receive any specific comments in response.

The amendment to Regulation FD will accommodate the information disclosure program that the Commission is establishing under paragraphs (a) and (b) of Rule 17g–5. Specifically, it will permit issuers to rely on Regulation FD in providing information to NRSROs that require subscriptions to access their ratings. In this way, the amendment will not favor a particular NRSRO business model. Furthermore, to the extent that it increases the number of NRSRO credit ratings for structured finance products, users of credit ratings will have more choices. Finally, the amendment to Regulation FD will provide legal certainty to arrangers who provide access to the information to NRSROs consistent with the mechanisms established by Rule 17g–5.

B. Costs

As discussed below, the amendments will result in costs to NRSROs, arrangers, and others. The costs to a given NRSRO arising from the amendments adopted today will depend on its size and the complexity of its business activities. The size and complexity of NRSROs vary significantly. Therefore, the cost to implement these rule amendments will vary significantly across NRSROs. The cost to NRSROs will also vary depending on which classes of credit ratings an NRSRO issues and how many outstanding ratings it has in each class. NRSROs which issue credit ratings for structured finance products may incur higher compliance costs than those NRSROs which do not issue such credit ratings or issue very few credit ratings in that class. For these reasons, the cost estimates represent the average cost across all NRSROs.

1. Amendment to Rule 17g–2

The amendments to paragraph (d) of Rule 17g–2 require NRSROs to make 100% of their ratings action histories for any credit rating initially determined on or after June 26, 2007 publicly available in an interactive data file that uses a machine-readable format, with either a twelve month or twenty-four month grace period, depending on whether the rating action relates to an issuer-paid credit rating or not.[257] An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission's List of XBRL Tags for NRSROs. As discussed with respect to the PRA, the Commission estimates that the total aggregate one-time burden to the industry to make the history of its rating actions publicly available initially in a machine-readable format, and subsequently in XBRL, will be 2,550 hours[258] and the total aggregate annual burden hours will be 450 hours.[259] For cost purposes, the Commission believes that a senior programmer will perform the functions required to comply with these requirements. Accordingly, the Commission estimates that an NRSRO will incur an average one-time cost of $24,820 and an average annual cost of $4,380, as a result of the proposed amendment.[260] The Commission does not believe the NRSRO will incur any additional software cost from initially providing the information in machine-readable format prior to transitioning to XBRL. Based on staff experience, the Commission believes that NRSROs already have the necessary software to provide this disclosure in machine-readable format. Moreover, the Commission notes that currently seven NRSROs are providing the disclosure required pursuant to Rule 17g–2(d) (or the 10% requirement) in machine-readable format. Therefore, the Commission estimates the total aggregate one-time paperwork cost to the industry will be $744,600[261] and the total aggregate paperwork costs annual cost to the industry will be $131,400.[262]

In the *February 2009 Proposing Release,* the Commission noted that the amendments may impose other costs. For example, making some information about ratings action histories available to the public for free may have some impact on the business models of NRSROs, although the amendment is designed to minimize any such impact. Further, the rule may affect NRSROs with different revenue sources and business models differently.

The Commission generally requested comment on all aspects of these cost estimates for the proposed amendments to paragraph (d) of Rule 17g–2. In addition, the Commission requested specific comment on the costs, for example, costs that will result from lost revenues incurred because NRSROs subject to the rule may not be able to sell ratings action histories if they are required to be publicly disclosed.[263] The Commission received seven letters that addressed the costs associated with complying with the proposed amendments to paragraph (d) of Rule 17g–2.[264] Several commenters argued that the proposed amendments entailed a higher likelihood of substantial financial harm to subscriber-paid NRSROs,[265] potentially resulting in fatal harm to the viability of the subscriber-paid business model.[266] Three commenters stated that without a longer grace period, the subscriber-based NRSROs would suffer a negative impact on sales of their products.[267] Two commenters stated that the proposed amendment would reduce the diversification of their revenue sources.[268] None of these commenters, however, provided any figures quantifying these costs.

As discussed in detail above,[269] the Commission believes that the grace periods in the rule will significantly mitigate the negative impact on NRSRO revenues that are derived from selling access to current ratings and downloads

[256] *See February 2009 Proposing Release,* 74 FR at 6473.

[257] *See* 17 CFR 240.17g–2(d).

[258] 45 hours × 30 NRSROs = 1,350 hours + 5 hours × 30 NRSROs for the one time burden of switching the disclosure to XBRL for a total of 1,500; *see also supra* note 209 at accompanying text.

[259] 15 hours × 30 NRSROs = 450 hours; *see also supra* note 210 at accompanying text.

[260] The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Senior Programmer is $292. Therefore, the average one-time cost would be $24,820 [(45 hours × $292 per hour) + (40 hours × $292 per hour for the transition to disclose the information in XBRL)] and the average annual cost would be $4,380 (15 hours per year × $292 per hour). In the *February 2009 Proposing Release,* the Commission based its estimate on an average hourly cost of $289 for a Senior Programmer as set forth in the *SIFMA 2007 Report as Modified,* which resulted in estimates of a one-time cost of $13,005 (45 hours × $289 per hour) and an average annual cost of $4,335 (15 hours per year × $289 per hour).

[261] $24,820 × 30 NRSROs = $744,600. The estimate set forth in the *February 2009 Proposing Release* was $390,050 ($13,005 × 30 NRSROs).

[262] $4,380 × 30 NRSROs = $131,400. The estimate set forth in the *February 2009 Proposing Release* was $130,150 ($4,335 × 30 NRSROs).

[263] *See February 2009 Proposing Release* 74, FR at 6503.

[264] *See* JCR Letter, ASF/SIFMA Letter, R&I Letter, Realpoint Letter, Moody's Letter, and S&P Letter.

[265] *See e.g.,* Hunt Letter; Realpoint Letter; Rapid Ratings Statement.

[266] *See e.g.,* Rapid Ratings Statement.

[267] *See* JCR Letter, R&I Letter, and Realpoint Statement.

[268] *See* Moody's Letter, S&P Letter.

[269] *See supra* discussion in Section II.D.

of current ratings. The Commission believes that the parties that pay subscription fees for access to NRSRO credit ratings and who pay for access to downloadable packages of issuer-paid and unsolicited credit ratings are unlikely to reconsider their purchase of those products due to the public availability of twelve to twenty-four month-old ratings action information. The Commission believes that most of the persons who pay for these services want access to the NRSRO's current views on the creditworthiness of obligors and debt instruments; as such, it is not likely that they will view credit ratings that may be as much as twenty-four months old as an adequate substitute for access to the NRSRO's current credit ratings. Furthermore, the amended rule, as adopted, does not require the disclosure of the analysis and report that typically accompany the publication of a credit rating. NRSROs will continue to be able to distribute such information as they see fit, including selling information to subscribers, which should serve to mitigate any such potential loss. As explained in detail above, the Commission's goals in adopting the amendments are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry, and the Commission has balanced carefully its goals with the potential costs. While the Commission believes that NRSRO revenues derived from selling access to current ratings and downloads of current ratings will not be affected significantly by these new disclosure requirements, as previously stated, the Commission intends to closely monitor the impact, if any, they have on those revenues.

To the extent NRSROs derive revenues from selling access to their ratings histories, the Commission acknowledges that the new rule may well have a negative impact on this revenue stream. As noted above, the amended rule does not require NRSROs to disclose the analysis or report that typically accompany a credit rating, which is expected to mitigate any potential loss of revenue. Also, as noted above, information gathered by Commission staff over the course of discussions with NRSROs indicates that the amount of revenues they derived from selling access to ratings histories is not significant when compared to the revenues derived from other credit rating services. Nonetheless, the Commission will monitor this issue and, as part of that monitoring, the Commission encourages an NRSRO to notify the Commission if the rule causes a loss of this revenue source that is significant when compared to its total revenues.

While the Commission intends to closely monitor the impact, if any, of the rule amendments being adopted today on the revenue derived from selling access to current and historical ratings as discussed above, the Commission notes that a decrease in revenues could be the result of a number of factors. External factors, such as a reduction in regulatory emphasis on credit ratings, an increase in the level of independent analysis performed by investors, and a loss of confidence in the quality of ratings generally could result in an industry-wide loss of revenues unrelated to the rule amendments being adopted today. In addition, the increased transparency provided by the rule may cause users of credit ratings to shift their business to an NRSRO that the marketplace views as providing better credit ratings.

One commenter raised an issue regarding the costs associated with supplying the disclosure with the required CUSIP, stating that it anticipates an increase in transaction costs to amend its CUSIP license as well as a potentially higher annual licensing fee.[270] The Commission notes that it addressed the potential increased costs associated with CUSIP licensing security in the *February 2009 Adopting Release* and that it believes that the estimates and evaluations of the costs set forth at that time continue to be valid.[271]

2. Amendment to Rule 17g–5

Rule 17g–5 requires an NRSRO to manage and disclose certain conflicts of interest [272] and prohibits certain other types of conflicts of interest outright.[273] The amendments to Rule 17g–5 add an additional conflict to paragraph (b) of Rule 17g–5 for NRSROs to manage: Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.[274] The amendments further specify that an NRSRO subject to this conflict is prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed: The amendments require an NRSRO that is hired by arrangers to perform credit ratings for structured finance products to disclose to other NRSROs the deals for which it is in the process of determining such credit ratings and to obtain representations from arrangers that the arrangers will provide the same information given to the hired NRSRO to other NRSROs. Specifically, an NRSRO rating such products will need to disclose to other NRSROs the following information on a password protected Internet Web site: A list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (D) of Rule 17g–5 as amended can be accessed.[275]

The Commission estimates that the average one-time cost to each NRSRO to establish the Internet Web site required under the rule as amended would be $66,900,[276] resulting in a total aggregate one-time cost to all NRSROs of $2,007,000.[277] As discussed with respect to the PRA, the Commission estimates a total aggregate annual hour burden of 14,880 hours.[278] The Commission estimates that the average annual cost to a large NRSRO would be $799,280, the average annual cost to an NRSRO not in that category would be

[270] *See* Moody's Letter.

[271] *See February 2009 Adopting Release,* 74 FR at 6477.

[272] 17 CFR 240.17g–5(a) and (b).

[273] 17 CFR 240.17g–5(c).

[274] Paragraph (b)(9) of Rule 17g–5.

[275] Paragraph (a)(3)(i) of Rule 17g–5.

[276] The Commission believes that an NRSRO would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Compliance Manager is $258 and the average hourly cost for a Programmer Analyst is $193. Therefore, the average one-time cost to an NRSRO would be (150 hours × $253) + (150 hours × $193) = $66,900. In the *February 2009 Proposing Release,* the Commission based its estimate on an average hourly cost of $245 for a Compliance Manager and $194 for a Programmer Analyst as set forth in the *SIFMA 2007 Report as Modified,* which resulted in an estimate of an average one-time cost to an NRSRO of (150 hours × $245) + (150 hours × $194) = $65,850.

[277] $66,900 × 30 NRSROs = $2,007,000. The estimate set forth in the *February 2009 Proposing Release* was $1,975,500 ($65,850 × 30 NRSROs).

[278] (3,880 hours per large NRSRO × 3) + (120 hours per NRSRO not in that category × 27) = 14,880 hours.

$24,720,[279] and the total aggregate annual cost to NRSROs will be $3,065,280.[280]

The amendments also require the hired NRSRO to obtain representations from the arranger that the arranger will disclose the following information:

- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and
- All information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.[281]

For purposes of the PRA, as discussed above, the Commission estimates that it will take an NRSRO approximately 5 hours to develop the written representation that the NRSRO is required to obtain from the issuer, sponsor or underwriter. The Commission estimates that the average one-time cost to an NRSRO would be $1,525 and the total aggregate one-time cost to NRSROs will be $45,750.[282]

For purposes of the PRA, as discussed above, the Commission estimates that it will take an arranger approximately 300 hours to develop a system, as well as policies and procedures to disclose the information. This results in a total one-time hour burden of 60,000 hours for 200 arrangers.[283] For these reasons, the Commission estimates that the average one-time cost to each arranger will be $66,900 [284] and the total aggregate one-time cost to the industry would be $13,380,000.[285]

As discussed with respect to the PRA, in addition to the one-time hour burden, arrangers also will disclose the information on a transaction by transaction basis. Based on staff experience and the estimate of 4,000 new structured finance deals per year, as discussed above, the Commission estimates that the amendments will result in each arranger disclosing information with respect to approximately 20 new transactions per year and that it will take approximately 1 hour per transaction to make the information publicly available.[286] Therefore, as discussed with respect to the PRA, the Commission estimates that the total aggregate annual hour burden for arrangers will be 4,000 hours.[287] The Commission estimates that the average annual cost to a respondent to be $4,120 [288] and the total annual cost to the industry to be $824,000.[289]

Rule 17g–5(a)(3)(iii)(D) requires hired NRSROs to obtain representations from the arranger that the arranger will disclose information provided to the hired NRSRO to undertake credit rating surveillance on a structured product. Because surveillance covers more than just initial ratings, the Commission estimates that an arranger will disclose information with respect to approximately 125 transactions on an ongoing basis and that the information will be provided to the hired NRSRO on a monthly basis. As discussed with respect to the PRA, the Commission estimates a total aggregate annual burden hours of 150,000 hours.[290] The Commission estimates that the average annual cost to a respondent will be $154,500 [291] and the total annual cost to the industry will be $30,900,000.[292]

An NRSRO that wishes to access information on another NRSRO's Web site or on an arranger's Web site will need to provide the Commission with an annual certification described in proposed new paragraph (e) to Rule 17g–5. In the PRA, the Commission estimates an aggregate annual hour burden to the industry of 60 hours.[293] For these reasons, the Commission estimates it will cost an NRSRO approximately $516 dollars per year [294]

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[279] The Commission believes that an NRSRO would have a Webmaster perform these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Webmaster is $206. Therefore, the average annual cost for a large NRSRO averaging 3,880 structured finance ratings would be $799,280 (3,880 hours × $206) and the average annual cost for an NRSRO not in that category averaging 120 structured finance ratings would be $24,720 (120 hours × $206). In the *February 2009 Proposing Release,* the Commission based its estimate on an average hourly cost of $205 for a Webmaster as set forth in the *SIFMA 2007 Report as Modified,* which resulted in an estimate of an average annual cost to a large NRSRO of $795,400 (3,880 hours × $205) and an average annual cost to NRSROs not in that category of $24,600 (120 hours × $205 = $24,600.)

[280] ($799,280 × 3) + ($24,720 × 27) = $3,065,280.

[281] *See* 17 CFR 240.17g–5(a)(3)(iii).

[282] The Commission believes that the NRSRO would have an in-house Attorney perform these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for an Attorney is $305. Therefore, the average one-time cost to an NRSRO would be (5 hours × $305) = $1,525, and the aggregate one-time cost to an NRSRO would be 30 NRSROs × $1,525 = $45,750.

[283] 300 hours × 200 respondents = 60,000 hours.

[284] The Commission believes that an arranger would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Compliance Manager is $258 and the average hourly cost for a Programmer Analyst is $193. Therefore, the average one-time cost to an arranger would be (150 hours × $253) + (150 hours × $193) = $66,900. In the *February 2009 Proposing Release,* the Commission based its estimate on an average hourly cost of $245 for a Compliance Manager and $194 for a Programmer Analyst as set forth in the *SIFMA 2007 Report as Modified,* which resulted in an estimate of an average one-time cost to an arranger of (150 hours × $245) + (150 hours × $194) = $65,850.

[285] $66,900 × 200 arrangers = $13,380,000. The estimate set forth in the *February 2009 Proposing Release* was $13,117,000 ($65,850 × 200 arrangers = $13,117,000).

[286] This estimate is based on the arranger already implementing the system and policies and procedures for disclosure. The Commission cannot estimate the number of initial transactions per year with certainty. The Commission believes that the number of deals on which each arranger will disclose information will vary widely based on the size of the arranger. In addition, the Commission believes that the number of asset-backed or mortgaged-backed issuances being rated by NRSROs in the next few years is difficult to predict given the recent credit market turmoil. The estimates, however, reflect the Commission's best assessment of the number of transactions based on experience and the available data.

[287] 20 hours × 200 respondents = 4,000 hours.

[288] The Commission believes that an arranger would have a Webmaster perform these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Webmaster is $206. Therefore, the average one-time cost to a respondent would be 20 hours × $206 = $4,120. In the *February 2009 Proposing Release,* the Commission based its estimate on an average hourly cost of $205 for a Webmaster as set forth in the *SIFMA 2007 Report as Modified,* which resulted in an estimate of an average one-time cost to an arranger of $4,100 (20 hours × $205 = $4,100.)

[289] $4,120 × 200 respondents = $824,000. The estimate set forth in the *February 2009 Proposing Release* was $820,000 ($4,100 × 200 respondents = $820,000.)

[290] 750 hours × 200 respondents = 150,000 hours.

[291] The Commission believes that an arranger would have a Webmaster perform these responsibilities. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Webmaster is $206. Therefore, the average annual cost to a respondent would be 750 hours × $206 = $154,500. In the *February 2009 Proposing Release,* the Commission based its estimate on an average hourly cost of $205 for a Webmaster as set forth in the *SIFMA 2007 Report as Modified,* which resulted in an estimate of an average annual cost to an arranger of $153,750 (750 hours × $205 = $153,750.)

[292] $154,500 × 200 respondents = $30,900,000. The estimate set forth in the *February 2009 Proposing Release* was $30,750,000 ($153,750 × 200 respondents = $30,750,000).

[293] 2 hours × 30 NRSROs = 60 hours.

[294] The Commission believes that an NRSRO would have a Compliance Manager prepare the annual certification. The *SIFMA 2008 Report as Modified* indicates that the average hourly cost for a Compliance Manager is $258. Therefore, the

and the industry $15,480 per year to comply with the certification requirement.[295]

The Commission requested comment on all aspects of these cost estimates for the amendments to Rule 17g–5. In addition, the Commission requested specific comment on whether the proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs; and whether there would be additional costs not identified.[296] The Commission received three comment letters that addressed the costs associated with the amendments to Rule 17g–5.[297] One commenter stated that the consideration of financial impact should be based on the economic value a given entity contributes to the economy and not the company's financial health.[298] Another stated that the proposal would create the need for additional technology and staff, especially in consideration of the strong controls needed to protect the proprietary data published on the Web site.[299] The third commenter raised the concern that the formulations of the disclosures and information-sharing proposals could create costs that outweigh any burden.[300] As discussed above, the Commission believes the benefits of the enhanced disclosure requirements pursuant to Rule 17g–5 justify the costs.

Lastly, the Commission notes that the conforming amendment to Regulation FD needed to facilitate the disclosure requirements under Rule 17g–5 will not result in any additional costs.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a)(2) of the Exchange Act[301] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. In addition, Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[302] requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.

As discussed in detail above, the amendments to paragraph (d) of Rule 17g–2 are designed to provide the marketplace with additional information for comparing the ratings performance of NRSROs and, therefore, provide users of credit ratings with more useful metrics with which to compare these NRSROs. Increased disclosure of ratings history for credit ratings will make the performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job analyzing credit risk. This may cause users of credit ratings to give greater weight to credit ratings of NRSROs that distinguish themselves by creating a track record of better credit rating performance than their peers. Moreover, to the extent this improves the quality of the credit ratings, persons that use credit ratings to make investment or lending decisions would have better information upon which to base their decisions. As a consequence, the rule may result in a more efficient allocation of capital and loans to issuers and obligors based on the risk appetites of the investors and lenders. The Commission believes that this enhanced disclosure will benefit smaller NRSROs that determine issuer-paid credit ratings to the extent they do a better job of assessing creditworthiness because these smaller NRSROs will be better able to compete with the larger NRSROs for new business; users of credit ratings will be able to compare credit rating performance, allowing smaller NRSROs more easily to compete based on quality and creditability of their ratings.

Also as discussed in detail above, the amendments to paragraphs (a) and (b) of Rule 17g–5 are designed to enhance competition among NRSROs. The goal of these amendments is to provide a mechanism to enhance the ability of NRSROs to prepare unsolicited credit ratings, which would provide users of credit ratings with more assessments of the creditworthiness of a structured finance product. This mechanism may expose NRSROs whose procedures and methodologies for determining credit ratings are less conservative in order to gain business. In the same way, by creating a mechanism for a range of NRSROs to issue ratings, it also may mitigate the impact of rating shopping if ratings issued by NRSROs not hired to rate a deal differ from those of hired NRSROs. These potential impacts of the amendments may help to restore confidence in credit ratings and, thereby, promote capital formation. The Commission further believes that these amendments could promote the more efficient allocation of capital by investors to the extent the quality of credit ratings is improved. In addition, these amendments could increase competition by creating a mechanism for smaller NRSROs to obtain the information necessary to rate structured products and to market themselves based on a demonstrated proficiency in rating these structured products.

The Commission generally requested comment on all aspects of this analysis of its consideration of the effect on competition and promotion of efficiency, competition, and capital formation. Several commenters argued that the proposed amendments entailed a higher likelihood of substantial financial harm to subscriber-paid NRSROs,[303] potentially resulting in fatal harm to the viability of the subscriber-paid business model.[304] Three commenters stated that without a longer grace period, the subscriber-based NRSROs would suffer a negative impact on sales of their products.[305]

As discussed in detail above, the Commission acknowledges the different grace periods provided for ratings disclose with respect to credit ratings that are issuer-paid or not.[306] The Commission believes that any competitive effects are limited because of the tailored time periods. The Commission believes that the twenty-four month grace period will significantly mitigate the negative impact on NRSRO revenues that are derived from selling subscriptions to their credit ratings and that the twelve month grace period will mitigate the impact on NRSRO revenues that are derived from selling downloadable access to their current credit ratings. Furthermore, the Commission believes that the parties that pay subscription fees for access to NRSRO credit ratings

average annual cost to an arranger would be $516 (2 hours × $258 = $516). In the *February 2009 Proposing Release,* the Commission based its estimate on an average hourly cost of $245 for a Compliance Manager which resulted in an estimate of an average annual cost to an arranger of $490 (2 hours × $245 = $490.)

[295] $516 × 30 NRSROs = $15,480. The estimate set forth in the *February 2009 Proposing Release* was $14,700 ($490 × 30 NRSROs = $14,700).

[296] *See February 2009 Proposing Release,* 74 FR at 6505.

[297] *See* Marchywka Letter, FSR Letter, ASF Statement.

[298] *See* Marchywka Letter.

[299] *See* FSR Letter.

[300] *See* ASF Statement.

[301] 15 U.S.C. 78w(a).

[302] 15 U.S.C. 78c(f).

[303] *See e.g.,* Hunt Letter; Realpoint Letter; Rapid Ratings Statement.

[304] *See e.g.,* Rapid Ratings Statement.

[305] *See* JCR Letter, R&I Letter, and Realpoint Statement.

[306] *See supra* discussion in Section II.D.

are unlikely to reconsider their purchase of those products due to the public availability of twenty-four month-old ratings action information. Likewise, the Commission believes that persons who pay for downloadable access to their current credit ratings are unlikely to re-consider their purchase of those products due to the public availability for databases containing twelve-month-old ratings action information.[307] The Commission believes that most of the persons who pay for these services want access to the NRSRO's current views on the creditworthiness of obligors and debt instruments; as such, it is not likely that they will view credit ratings that are twelve to twenty-four months old as an adequate substitute for access to the NRSRO's current credit ratings. As noted previously, the amended rule, as adopted, does not require the disclosure of the analysis and report that typically accompany the publication of a credit rating. NRSROs will continue to be able to distribute such information as they see fit, including restricting access to such information to paying subscribers, which should serve to mitigate any potential loss of subscribers.

As stated above, the Commission's goals in adopting the amendments are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry. Enacting regulations that would threaten the ability of competitors to enter and compete with existing NRSROs in a manner consistent with the Exchange Act would be adverse to these goals. While the Commission believes that NRSRO revenues derived from selling access to current credit ratings will not be affected significantly by these new disclosure requirements, as previously stated, the Commission intends to closely monitor the impact, if any, they have on those revenues.

VII. Final Regulatory Flexibility Analysis

The Commission proposed amendments to Rules 17g–2 and 17g–5 under the Exchange Act. An Initial Regulatory Flexibility Analysis (''IRFA'') was published in the *February 2009 Proposing Release*.[308] The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA''), in accordance with the provisions of the Regulatory Flexibility Act,[309] regarding the amendments to Rules 17g–2 and 17g–5 under the Exchange Act.

A. Need for and Objective of the Amendments

The amendments prescribe additional requirements for NRSROs to address concerns relating to the transparency of ratings actions and the conflicts of interest at NRSROs. The objectives of the Rating Agency Act are ''to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.'' [310] The amendments are designed to improve the transparency of credit ratings performance by making credit ratings actions publicly available and the accuracy of credit ratings for structured finance products by increasing competition among the NRSROs that rate these securities and money market instruments.

B. Significant Issues Raised by Commenters

The Commission sought comment with respect to every aspect of the IRFA, including comments with respect to the number of small entities that may be affected by the amendments.[311] The Commission asked commenters to specify the costs of compliance with the proposed rules and suggest alternatives that would accomplish the goals of the rules.[312] The Commission did not receive any comments on the IRFA. The Commission, did, however receive comments arguing that the amendments requiring disclosure of 100% of ratings actions would negatively impact the revenue of NRSROs operating under the subscriber-paid model, although these commenters did not address whether their comments pertained to entities that would be small businesses for purposes of Regulatory Flexibility Act analysis.[313]

As stated above, the Commission believes that the twenty-four month grace period will significantly mitigate any negative impact on NRSRO revenues that are derived from selling subscriptions to current ratings. The parties that pay subscription fees for access to NRSRO credit ratings are unlikely to reconsider their purchase of those products due to the public availability of twenty-four month-old ratings action information. Furthermore, the amended rule, as adopted, does not require the disclosure of the analysis and report that typically accompany the publication of a credit rating. NRSROs will continue to be able to distribute such information as they see fit, including restricting access to such information to paying subscribers, which should serve to mitigate any potential loss of subscribers. While the Commission believes that NRSRO revenues derived from selling access to current credit ratings will not be affected significantly by these new disclosure requirements, the Commission will closely monitor the impact, if any, they have on those revenues. If this monitoring reveals that users of credit ratings are ceasing to purchase access to current credit ratings or downloads of current credit ratings because of the public disclosure of the histories of those ratings, the Commission will re-examine the rule and, if appropriate, consider modifications. At the same time, the Commission notes that the purpose of the rule is to allow users of credit ratings to better assess and compare the performance of NRSROs. The increased transparency provided by the rule could cause users of credit ratings to shift their business to an NRSRO that the marketplace views as providing the highest quality credit ratings. As a result, smaller NRSROs may benefit to the extent that they are better able to establish a reputation for providing high quality ratings and therefore increase their market share.

Although, the Commission did not receive any comments on the IRFA with respect to the re-proposed amendments to Rule 17g–5, the Commission did receive comments that addressed the proposal. Specifically, one commenter argued that the new disclosure requirement would favor large NRSROs with market power at the expense of small NRSROs.[314] The Commission notes that the rule is designed, among other things, to benefit small NRSROs to allow them the opportunity to rate structured finance products even if they are not hired by the arranger to determine the credit rating. The Commission recognizes that small NRSROs that are hired by an arranger to rate a structured finance product will incur a burden by having to make this information available to other NRSROs and conceivably lose business if other NRSROs develop a track record for doing a better job. However, the Commission believes that the burden of having to disclose the information is not significant. Moreover, with respect to losing business the rule is designed to foster competition and create a market

[307] *Id.*

[308] *See February 2009 Proposing Release,* 74 FR at 6506.

[309] 5 U.S.C. 603.

[310] *See Senate Report.*

[311] *See February 2009 Proposing Release* 74 FR at 6506.

[312] *Id.*

[313] *See e.g.* JCR Letter; R&I Letter; Realpoint Statement.

[314] *See* JCR Letter.

where an NRSRO must perform well in determining a credit rating to succeed.

Three other comments argued that the costs of creating and maintaining a Web site are significant and would negatively impact smaller NRSROs in addition to potentially creating security risks.[315] As noted above, the Commission is sensitive to the costs of the new requirement but does not believe they are significant. As previously discussed, all of the NRSROs currently maintain Internet Web sites, in most cases with password-protected portals that their subscribers and registered users can access to obtain information posted by the NRSRO. Consequently, the Commission believes that adding a portal for other NRSROs to access pending deal information is not expected to require significant additional Internet Web site design and maintenance.

C. Small Entities Subject to the Rule

Paragraph (a) of Rule 0–10 provides that for purposes of the Regulatory Flexibility Act, a small entity ''[w]hen used with reference to an 'issuer' or a 'person' other than an investment company'' means ''an 'issuer' or 'person' that, on the last day of its most recent fiscal year, had total assets of $5 million or less.'' [316] The Commission believes that an NRSRO with total assets of $5 million or less qualifies as a ''small'' entity for purposes of the Regulatory Flexibility Act.

As noted in the *June 2007 Adopting Release,*[317] the Commission believes that approximately 30 credit rating agencies ultimately would be registered as an NRSRO. Currently, there are two NRSROs that are classified as ''small'' entities for purposes of the Regulatory Flexibility Act.[318]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The amendments to paragraph (d) Rule 17g–2 add the requirement that an NRSRO disclose ratings actions histories in an interactive data file that uses a machine-readable format for all credit ratings initially determined on or after June 26, 2007, with each new ratings action to be reflected in such publicly disclosed histories no later than twelve months after the action for rating actions related to credit ratings that are issuer-paid, and no later than twenty-four months after it is taken for rating actions related to credit ratings that are not issuer-paid.[319] An NRSRO will be allowed to use any machine-readable format to make this data publicly available until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the NRSRO will be required to make the information available in XBRL format using the Commission's List of XBRL Tags for NRSROs.[320] This new disclosure requirement applies to all NRSRO credit ratings regardless of the business model under which they are determined.

The amendments to paragraphs (a) and (b) of Rule 17g–5 being adopted today require an NRSRO that is hired by arrangers to perform credit ratings for structured finance products (1) to disclose to non-hired NRSROs that have furnished the Commission with the certificate described below the deals for which they are in the process of determining such credit ratings and (2) to obtain written representations from arrangers on which the NRSRO can reasonably rely that the arrangers will provide information given to the hired NRSRO to non-hired NRSROs that have furnished the Commission with the certificate described below.[321] In addition, a new paragraph (e) of Rule 17g–5 requires NRSROs seeking to access the information maintained by the NRSROs and the arrangers pursuant to the amended rules to furnish the Commission an annual certification that they are accessing the information solely to determine credit ratings and will determine a minimum number of credit ratings using that information.[322]

E. Significant Alternatives

Pursuant to Section 3(a) of the Regulatory Flexibility Act,[323] the Commission must consider certain types of alternatives, including: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission is not establishing different compliance or reporting requirements or timetables but is using performance standards. The Commission believes that obtaining comparable information from NRSROs regardless of size is important. Moreover, because the amendments are designed to improve the overall quality of ratings by promoting transparency, accountability, and competition, and to enhance the Commission's oversight, the Commission believes that small entities should be covered by the rule.

VIII. Statutory Authority

The Commission is amending Rule 17g–2 and Rule 17g–5 pursuant to the authority conferred by the Exchange Act, including Sections 3(b), 15E, 17, and 23(a).[324]

Text of the Amendments

List of Subjects in 17 CFR Parts 240 and 243

17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

17 CFR Part 243

Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Section 240.17g–2 is amended by revising paragraph (d) to read as follows:

§ 240.17g–2 Records to be made and retained by nationally recognized statistical rating organizations.

* * * * *

(d)(1) *Manner of retention.* An original, or a true and complete copy of the original, of each record required to be retained pursuant to paragraphs (a) and (b) of this section must be maintained in a manner that, for the applicable retention period specified in paragraph (c) of this section, makes the original record or copy easily accessible

[315] *See* DBRS Letter; ASF/SIMFA Letter; Moody's Letter.

[316] 17 CFR 240.0–10(a).

[317] *June 2007 Adopting Release,* 72 FR at 33618.

[318] *See* 17 CFR 240.0–10(a).

[319] *See* Paperwork Reduction Act, *supra* Section IV.

[320] *See* 17 CFR 240.17g–2(d).

[321] *See* 17 CFR 240.17g–5(a)(3) and (b)(9); *see also* Paperwork Reduction Act, *supra* Section IV.

[322] *See* 17 CFR 240.17g–5(e).

[323] 5 U.S.C. 603(c).

[324] 15 U.S.C. 78c(b), 78o–7, 78q, and 78w.

to the principal office of the nationally recognized statistical rating organization and to any other office that conducted activities causing the record to be made or received.

(2) A nationally recognized statistical rating organization must make and keep publicly available on its corporate Internet Web site in an XBRL (eXtensible Business Reporting Language) format the ratings action information for ten percent of the outstanding credit ratings required to be retained pursuant to paragraph (a)(8) of this section, selected on a random basis, for each class of credit rating for which it is registered and for which it has issued 500 or more outstanding credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated. Any ratings action required to be disclosed pursuant to this paragraph (d)(2) need not be made public less than six months from the date such ratings action is taken. If a credit rating made public pursuant to this paragraph is withdrawn or the instrument rated matures, the nationally recognized statistical rating organization must randomly select a new outstanding credit rating from that class of credit ratings in order to maintain the 10 percent disclosure threshold. In making the information available on its corporate Internet Web site, the nationally recognized statistical rating organization shall use the List of XBRL Tags for NRSROs as specified on the Commission's Internet Web site.

(3)(i)(A) A nationally recognized statistical rating organization must make publicly available on its corporate Internet Web site in an interactive data file that uses a machine-readable format the ratings action information required to be retained pursuant to paragraph (a)(8) of this section for any credit rating initially determined by the nationally recognized statistical rating organization on or after June 26, 2007.

(B) Any ratings action information required to be made and kept publicly available on a nationally recognized statistical rating organization's corporate Internet Web site pursuant to paragraph (d)(3)(i)(A) of this section with respect to credit ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated need not be made public less than twelve months from the date such ratings action is taken.

(C) Any ratings action information required to be made and kept publicly available on a nationally recognized statistical rating organization's corporate Internet Web site pursuant to paragraph (d)(3)(i)(A) of this section with respect to credit ratings other than those ratings described in paragraph (d)(3)(i)(B) of this section need not be made public less than twenty-four months from the date such ratings action is taken.

(ii) In making the information required under paragraph (d)(3)(i) of this section available in an interactive data file on its corporate Internet Web site, the nationally recognized statistical rating organization shall use any machine-readable format, including but not limited to XBRL format, until 60 days after the date on which the Commission publishes a List of XBRL Tags for NRSROs on its Internet Web site, at which point the nationally recognized statistical rating organization shall make this information available in an interactive data file on its corporate Internet Web site in XBRL format using the List of XBRL Tags for NRSROs as published by the Commission on its Internet Web site.

* * * * *

■ 3. Section 240.17g–5 is amended by:
■ a. Removing the word ''and'' at the end of paragraph (a)(1);
■ b. Removing the period at the end of paragraph (a)(2) and in its place adding ''; and'';
■ c. Adding paragraph (a)(3);
■ d. Redesignating paragraph (b)(9) as paragraph (b)(10);
■ e. Adding new paragraph (b)(9); and
■ f. Adding new paragraph (e).

The additions read as follows:

§ 240.17g–5 Conflicts of interest.

(a) * * *

(3) In the case of the conflict of interest identified in paragraph (b)(9) of this section relating to issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction, the nationally recognized statistical rating organization:

(i) Maintains on a password-protected Internet Web site a list of each such security or money market instrument for which it is currently in the process of determining an initial credit rating in chronological order and identifying the type of security or money market instrument, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the issuer, sponsor, or underwriter of the security or money market instrument represents that the information described in paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of this section can be accessed;

(ii) Provides free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year, provided that such certification indicates that the nationally recognized statistical rating organization providing the certification either:

(A) Determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to 17 CFR 240.17g–5(a)(3)(iii) in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or

(B) Has not accessed information pursuant to 17 CFR 240.17g–5(a)(3) 10 or more times during the most recently ended calendar year; and

(iii) Obtains from the issuer, sponsor, or underwriter of each such security or money market instrument a written representation that can reasonably be relied upon that the issuer, sponsor, or underwriter will:

(A) Maintain the information described in paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of this section available at an identified password-protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating;

(B) Provide access to such password-protected Internet Web site during the applicable calendar year to any nationally recognized statistical rating organization that provides it with a copy of the certification described in paragraph (e) of this section that covers that calendar year, provided that such certification indicates that the nationally recognized statistical rating organization providing the certification either:

(*1*) Determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to 17 CFR 240.17g–5(a)(3)(iii) in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or

(*2*) Has not accessed information pursuant to 17 CFR 240.17g–5(a)(3) 10 or more times during the most recently ended calendar year.

(C) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization, or contracts with a

third party to provide to the nationally recognized statistical rating organization, for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the nationally recognized statistical rating organization; and

(D) Post on such password-protected Internet Web site all information the issuer, sponsor, or underwriter provides to the nationally recognized statistical rating organization, or contracts with a third party to provide to the nationally recognized statistical rating organization, for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the nationally recognized statistical rating organization.

* * * * *

(b) * * *

(9) Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument;

* * * * *

(e) *Certification.* In order to access a password-protected Internet Web site described in paragraph (a)(3) of this section, a nationally recognized statistical rating organization must furnish to the Commission, for each calendar year for which it is requesting a password, the following certification, signed by a person duly authorized by the certifying entity:

The undersigned hereby certifies that it will access the Internet Web sites described in 17 CFR 240.17g–5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to 17 CFR 240.17g–5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o–7(g)(1)) and 17 CFR 240.17g–4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to 17 CFR 240.17g–5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: (1) In the most recent calendar year during which it accessed information pursuant to 17 CFR 240.17g–5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in 17 CFR 240.17g–5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or (2) The undersigned previously has not accessed information pursuant to 17 CFR 240.17g–5(a)(3) 10 or more times during the most recently ended calendar year.

PART 243—REGULATION FD

■ 4. The authority citation for part 243 continues to read as follows:

Authority: 15 U.S.C. 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a–29, unless otherwise noted.

■ 5. Section 243.100 is amended by revising paragraph (b)(2)(iii) to read as follows:

§ 243.100 General rule regarding selective disclosure.

* * * * *

(b) * * *

(2) * * *

(iii) To the following entities solely for the purpose of determining or monitoring a credit rating:

(A) Any nationally recognized statistical rating organization, as that term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(62)), pursuant to § 240.17g–5(a)(3) of this chapter; or

(B) Any credit rating agency, as that term is defined in Section 3(a)(61) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(61)), that makes its credit ratings publicly available; or

* * * * *

By the Commission.

Dated: November 23, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–28496 Filed 12–3–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249b

[Release No. 34–61051; File No. S7–28–09]

RIN 3235–AK14

Proposed Rules for Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Proposed rules.

SUMMARY: The Commission is proposing rule amendments and a new rule that would impose additional requirements on nationally recognized statistical rating organizations (''NRSROs''). The proposed amendments and rule would require an NRSRO: to furnish a new annual report describing the steps taken by the firm's designated compliance officer during the fiscal year with respect to compliance reviews, identifications of material compliance matters, remediation measures taken to address those matters, and identification of the persons within the NRSRO advised of the results of the reviews; to disclose additional information about sources of revenues on Form NRSRO; and to make publicly available a consolidated report containing information about revenues of the NRSRO attributable to persons paying the NRSRO for the issuance or maintenance of a credit rating. The Commission is proposing these rules, in conjunction with a separate release being issued today adopting certain rule amendments, to further address concerns about the integrity of the credit rating procedures and methodologies at NRSROs. Finally, at this time, the Commission is announcing that it is deferring consideration of action with respect to a proposed rule that would have required an NRSRO to include, each time it published a credit rating for a structured finance product, a report describing how the credit ratings procedures and methodologies and credit risk characteristics for structured finance products differ from those of other types of rated instruments, or, alternatively, to use distinct ratings symbols for structured finance products that differentiated them from the credit ratings for other types of financial instruments. The Commission is also soliciting comments regarding alternative measures that could be taken to differentiate NRSROs' structured finance credit ratings from the credit ratings they issue for other types of financial instruments through, for example, enhanced disclosures of information. The Commission also is soliciting comment on whether the rule amendments being adopted today in a separate release designed to remove impediments to determining and monitoring non-issuer-paid credit ratings for structured finance products should be extended to create a mechanism for determining non-issuer-paid credit ratings for structured finance products that were issued prior to the rule becoming effective (*e.g.,* to allow for non-issuer-paid credit ratings for structured finance products of the 2004–2007 vintage). The Commission strongly encourages market participants and all others to provide their views.

DATES: Comments should be received on or before February 2, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–28–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–28–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Deputy Associate Director, at (202) 551–5521; Randall W. Roy, Assistant Director, at (202) 551–5522; Joseph I. Levinson, Special Counsel, at (202) 551–5598; Sheila Dombal Swartz, Special Counsel, at (202) 551–5545; Rose Russo Wells, Special Counsel, at (202) 551–5527; Rebekah E. Goshorn, Attorney, at (202) 551–5514; Marlon Q. Paz, Senior Counsel to the Director, at (202) 551–5756; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION:

I. Background

On February 2, 2009, the Commission adopted amendments to its existing rules governing the conduct of NRSROs under the Securities Exchange Act of 1934 (''Exchange Act'').[1] The Commission proposed these rule amendments in June 2008 to further the purposes of the Credit Rating Agency Reform Act of 2006 (''Rating Agency Act'') to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.[2] The amendments also were designed to further address concerns about the integrity of the process by which NRSROs rate structured finance products, particularly mortgage related securities.[3] Concurrent with the

[1] *See Amendments to Rules for Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 59342 (February 2, 2009), 74 FR 6485 (February 9, 2009) (''*February 2009 Adopting Release*'').

[2] Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008) (''*June 2008 Proposing Release*''). The Commission adopted the initial set of NRSRO rules in June 2007. *See Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007) (''*June 2007 Adopting Release*''). In July 2008, the Commission also proposed a series of amendments to rules under the Exchange Act, Securities Act of 1933 (''Securities Act''), and Investment Company Act of 1940 (''Investment Company Act'') that would eliminate references to ratings issued by NRSROs in certain rules and forms. *See References to Ratings of Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 58070 (July 1, 2008), 73 FR 40088 (July 11, 2008); *Securities Ratings,* Securities Act Release No. 8940 (July 1, 2008), 73 FR40106 (July 11, 2008); *References to Ratings of Nationally Recognized Statistical Rating Organizations,* Investment Company Act Release No. 28327 (July 1, 2008), 73 FR 40124 (July 11, 2008).

[3] The term ''structured finance product'' as used throughout this release refers broadly to any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This broad category of financial instrument includes, but is not limited to, asset-backed securities such as residential mortgage-backed securities (''RMBS'') and to other types of structured debt instruments such as collateralized debt obligations (''CDOs''), including synthetic and hybrid CDOs, or collateralized loan obligations (''CLOs'').

adoption of those final rule amendments, the Commission proposed, in a separate release, additional amendments to Rule 17g–2(d) and re-proposed amendments to paragraphs (a) and (b) of Rule 17g–5 as well as a new paragraph (e) to Rule 17g–5 and a conforming amendment to Regulation FD.[4] In separate releases, the Commission is adopting, with revisions, the rule amendments proposed in the *February 2009 Proposing Release,*[5] and proposing amendments to Regulation S–K, and rules and forms under the Securities Act, the Exchange Act and the Investment Company Act to require disclosure regarding credit ratings that a registrant uses in connection with a registered offering.[6] The Commission also is adopting amendments to remove references to NRSROs in certain Commission rules and forms and re-opening the comment period to extend the time to comment on proposals to remove references to NRSROs in other Commission rules.[7]

In this release, the Commission is proposing amendments to Rule 17g–3 to require an NRSRO to furnish a new unaudited annual report to the Commission describing the steps taken by the NRSRO's designated compliance officer[8] during the fiscal year to fulfill the compliance officer's responsibilities as set forth in Section 15E(j) of the Exchange Act.[9] That statutory provision requires an NRSRO to designate an individual responsible for (1) administering the policies and procedures that are required to be established pursuant to Sections 15E(g) and (h) of the Exchange Act; and (2) ensuring compliance with securities laws and rules and regulations, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act.[10] Pursuant to the proposed amendment to Rule 17g–3, an NRSRO would be required to furnish a report to the Commission describing compliance reviews undertaken by the compliance officer during the fiscal year, material compliance matters identified during the reviews, measures implemented to remediate the material compliance issues identified, and persons within the NRSRO who were advised of the results of the reviews.

In addition, the Commission is proposing in this release to amend the Instructions to Exhibit 6 to Form NRSRO to require a credit rating agency applying to be registered as an NRSRO or an NRSRO providing its annual update to Form NRSRO to publicly disclose: (1) The percentage of the net revenue of the applicant/NRSRO attributable to the 20 largest users of credit rating services of the applicant/NRSRO; and (2) the percentage of the revenue of the applicant/NRSRO attributable to services and products other than credit rating services. The Commission notes that the first proposed disclosure would be an aggregate in that it would be the sum of the amount of net revenue attributed to the 20 largest users of credit rating services (*i.e.* not 20 separate net revenue amounts). In conjunction with this proposed amendment to the Instructions to Exhibit 6, the Commission is proposing to move the definitions of certain terms currently included in the Instructions to Exhibit 10 to the Explanation of Terms section of the Form NRSRO Instructions in order to make those definitions applicable to Form NRSRO as a whole.

Finally, the Commission is proposing a new rule—Rule 17g–7—that would require an NRSRO, on an annual basis, to make publicly available on its Internet Web site a consolidated report that shows three items of information with respect to each person that paid the NRSRO to issue or maintain a credit rating. First, the NRSRO would be required to disclose the percent of the net revenue attributable to the person that were earned by the NRSRO for that fiscal year from providing services and products other than credit rating services. Second, the NRSRO would have to indicate the relative standing of the person in terms of the person's contribution to the revenue of the NRSRO for the fiscal year as compared with other persons who provided the NRSRO with revenue. Third, the NRSRO would be required to identify all outstanding credit ratings paid for by the person.

As discussed in detail below, the proposed amendments seek to further advance the goals of the Commission's current oversight program for NRSROs, including increasing transparency and disclosure, and diminishing conflicts, as well as continuing to further the goals of the Rating Agency Act ''to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating agency industry.'' [11]

The Commission believes that the proposed amendment to Rule 17g–3 to require NRSROs to furnish the Commission with an additional unaudited annual report would further improve the integrity of the ratings process and enhance accountability by requiring the designated compliance officer to annually report on actions taken to fulfill the officer's statutory responsibilities. While each NRSRO has a designated compliance officer under Section 15E(j) of the Exchange Act, the requirement to provide the Commission with such a report would, the Commission believes, help establish or further reinforce a discipline and rigor in the compliance officer's performance of his or her duties.[12] It also is designed to strengthen the Commission's existing oversight of NRSROs by highlighting possible problem areas in an NRSRO's rating processes and by providing an additional tool for the Commission to determine whether the NRSRO's designated compliance officer is fulfilling the responsibilities prescribed in Section 15E of the Exchange Act.[13] In addition, this information is designed to assist the Commission staff in its examination of NRSROs. The proposed amendments to the Exhibit 6 Instructions to Form NRSRO that would require additional disclosures are designed to further increase transparency by allowing users of credit ratings to more effectively evaluate the integrity of an NRSRO's credit ratings and analyze whether the NRSRO is effectively managing its conflicts of interests. Finally, the Commission believes that proposed new Rule 17g–7

[4] *See Re-proposed Rules for Nationally Recognized Statistical Rating Organizations,* Exchange Act Release No. 59343 (February 2, 2009), 74 FR 6456 (February 9, 2009) (''*February 2009 Proposing Release*'').

[5] Exchange Act Release No. 61050 (''*Companion Release*'').

[6] Securities Act No. 9070 (October 7, 2009) 74 FR 53086 (October 15, 2009).

[7] *See* Exchange Act Release No. 60789 (October 5, 2009), 74 FR 53258 (October 9, 2009) (adopting release to remove references to NRSROs); *see also* Securities Act Release No. 9069 (October 5, 2009) 74 FR 53274 (October 9, 2009) (release to re-open for comment proposals to remove references to NRSROs).

[8] *See* 15 U.S.C. 78o–7(j). Section 15E(j) of the Exchange Act requires an NRSRO to ''designate an individual responsible for administering the policies and procedures that are required to be established pursuant to [Section 15E(g) and Section 15E(h) of the Exchange Act], and for ensuring compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to [Section 15E of the Exchange Act].'' 15 U.S.C. 78o–7(j).

[9] *See* 15 U.S.C. 78o–7(j).

[10] *Id.*

[11] *See* Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 3850, Credit Rating Agency Reform Act of 2006, S. Report No. 109–326, 109th Cong., 2d Sess. (Sept. 6, 2006) (''Senate Report''), p. 2.

[12] The Commission also notes that other areas of the Commission's rules and regulations also require an annual report by a chief compliance officer with respect to investment companies and investment advisers. *See generally,* Rule 38a–1, 17 CFR 270.38a–1, and Rule 206(4)–7, 17 CFR 275.206(4)–7.

[13] 15 U.S.C. 78o–7(j).

also would further increase transparency as well as enhance disclosures with respect to an NRSRO's management of its conflicts of interest by providing users of credit ratings with information about the potential risk of undue influence that arises when an NRSRO is paid to determine a credit rating for a specific obligor, security, or money market instrument.

In addition to the proposed rule amendments, the Commission is announcing today that it is deferring the consideration of action with regard to the rule proposed in the *June 2008 Proposing Release* that would have required an NRSRO to include, each time it published a credit rating for a structured finance product, a report describing how the credit ratings procedures and methodologies and credit risk characteristics for structured finance products differ from those of other types of rated instruments, or, alternatively, to use distinct ratings symbols for structured finance products that differentiated them from the credit ratings for other types of financial instruments. Instead, the Commission is soliciting comment regarding alternative measures that could be taken to differentiate NRSROs' structured finance credit ratings from the credit ratings they issue for other types of financial instruments through, for example, enhanced disclosures of information. The Commission also is soliciting comment on whether the rule amendments being adopted today in the *Companion Release* designed to remove impediments to determining and monitoring non-issuer-paid credit ratings for structured finance products should be extended to create a mechanism for determining non-issuer-paid credit ratings for structured finance products that were issued prior to the rule becoming effective (*e.g.,* to allow for non-issuer-paid credit ratings for structured finance products of the 2004–2007 vintage). Specifically, the Commission is soliciting comment on whether the rule's goal could be furthered by applying its requirements or similar requirements to structured finance products that were issued prior to the compliance date of the rule as amended.

II. Proposed Amendment to Rule 17g–3

The Commission adopted Rule 17g–3 pursuant to authority in Section 15E(k)[14] of the Exchange Act, which requires an NRSRO to furnish to the Commission, on a confidential basis[15] and at intervals determined by the Commission, such financial statements and information concerning its financial condition as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. The statute also provides that the Commission may, by rule, require that the financial statements be certified by an independent public accountant.[16] In addition, Section 17(a)(1) of the Exchange Act[17] requires an NRSRO to make and keep such records, and make and disseminate such reports, as the Commission prescribes by rule as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the Exchange Act.[18]

Rule 17g–3 currently requires an NRSRO to furnish to the Commission on an annual basis the following reports: audited financial statements; unaudited consolidating financial statements of the parent of the NRSRO, if applicable; an unaudited report concerning revenues by category of revenue; an unaudited report concerning compensation of the NRSRO's credit analysts; an unaudited report listing the largest customers of the NRSRO; and an unaudited report on the number of credit rating actions taken during the fiscal year in each class of credit ratings for which the NRSRO is registered with the Commission.[19] The rule further requires an NRSRO to furnish the Commission these reports within 90 days of the end of its fiscal year.[20]

The Commission's staff understands that the designated compliance officer of some NRSROs may, in some cases, not be fulfilling the compliances officer's statutorily mandated duties, as prescribed by Section 15E(j) of the Exchange Act.[21] Further, during examinations in 2008 of three of the largest NRSRO's, Commission staff also identified issues with respect to each NRSROs policies and procedures and improvements that could be made.[22] In light of these concerns and the importance of an effective NRSRO compliance program, the Commission is proposing to amend Rule 17g–3 by adding paragraph (a)(7), which would require an NRSRO to furnish to the Commission an additional unaudited annual report. This report would be furnished to the Commission, on a confidential basis, consistent with the other reports required under Rule 17g–3.[23]

Proposed new paragraph (a)(7)(i) of Rule 17g–3 would provide that the new report must describe the steps taken by the NRSRO's designated compliance officer during the fiscal year to: (1) Administer the policies and procedures that are required to be established pursuant to Sections 15E(g) and (h) of the Exchange Act; and (2) ensure compliance with securities laws and rules and regulations, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act.[24] Proposed new paragraph (a)(7)(ii) of Rule 17g–3 would provide that the new report must include: (1) A description of any compliance reviews of the activities of the NRSRO; (2) the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such matter; (3) a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO; and (4) a description of the persons within the NRSRO who were advised of the results of the reviews.[25] Finally, the Commission is proposing to amend paragraph (b) to Rule 17g–3 to require that the proposed new report required under paragraph (a)(7) be accompanied by a statement signed by the NRSRO's designated compliance officer stating that the person has responsibility for the report and, to the best of the knowledge of the designated compliance officer, the report fairly

[14] 15 U.S.C. 78o–7(k).

[15] An NRSRO can request that the Commission keep this information confidential. *See* Section 24 of the Exchange Act (15 U.S.C. 78x), 17 CFR 240.24b–2, 17 CFR 200.80 and 17 CFR 200.83.

[16] *Id.*

[17] 15 U.S.C. 78q(a)(1).

[18] *See* Section 5 of the Rating Agency Act and 15 U.S.C. 78q(a)(1).

[19] 17 CFR 240.17g–3(a)(1)–(6).

[20] 17 CFR 240.17g–3(a).

[21] 15 U.S.C. 78o–7(j).

[22] *See generally, Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies* (July 8, 2008). The report is available on the Commission's Internet Web site, located at *http://www.sec.gov/news/studies/2008/craexamination070808.pdf.*

[23] *See supra* notes 14 and 15; *see also June 2007 Adopting Release,* 72 FR at 33590, footnote 300 and *June 2008 Proposing Release,* 73 FR 36234, footnote 143.

[24] Section 15E(g) of the Exchange Act provides, in pertinent part, that an NRSRO must establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of the business of such NRSRO, to prevent the misuse of material, nonpublic information. 15 U.S.C. 78o–7(g). Section 15E(h) of the Exchange Act, provides, in pertinent part, that an NRSRO must establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of the business of such NRSRO and affiliated persons and affiliated companies thereof, to address and manage any conflicts of interest that can arise from such business. 15 U.S.C. 78o–7(h).

[25] *See* proposed Rule 17g–3(a)(7)(ii).

presents, in all material respects, steps taken by the designated compliance officer for the period presented.

The proposed new report would be unaudited, consistent with the other unaudited reports currently required under Rule 17g–3.[26] As discussed below, the Commission preliminarily believes that the proposed amendment would improve the integrity of the credit ratings process by establishing a more structured discipline under which the NRSRO's designated compliance officer would need to report to the Commission the steps taken to fulfill the officer's statutory responsibilities. The act of reporting these steps is designed to promote the active engagement of the designated compliance officer in reviewing an NRSRO's compliance with the securities laws and its own internal policies and procedures. The Commission preliminarily believes that because the compliance officer would be required to report these steps, the act of reporting should, in turn, foster improved compliance. Furthermore, the requirement in the report to identify the persons within the NRSRO advised of the results of the review could also promote the appropriate escalation of compliance issues to the management of the NRSRO.

The report also is designed to further strengthen the Commission's oversight of NRSROs by highlighting possible problem areas in an NRSRO's rating processes and providing an additional tool for the Commission to determine whether the NRSRO's designated compliance officer is fulfilling the responsibilities prescribed in Section 15E of the Exchange Act.[27] For example, if an NRSRO reports a large number of material compliance matters in a particular area, the Commission examination staff could focus on that particular area as part of their next review of the NRSRO. Alternatively, if a report indicates no problems, but a subsequent Commission staff examination reveals material compliance matters, this could be brought to the attention of the NRSRO's management for appropriate action.

The report is also designed to assist the Commission in its oversight of NRSROs to the extent they reveal trends across NRSROs or material compliance matters that could migrate from one NRSRO to other NRSROs because, for example, they arise from rating similar products or debt issued by a particular issuer that engages more than one NRSRO.

Finally, the Commission preliminarily believes that the proposed report would also help facilitate the Commission's examination staff efforts to conduct each exam of an NRSRO in an organized and efficient manner and thus to allocate resources to maximize investor protection.[28] The Commission notes that the proposed report would not be the sole factor the Commission's exam staff would use to determine the particular focus of an exam, but would be one of many factors used to make that determination.

A. Proposed New Paragraph 17g–3(a)(7)(i)

As stated above, the proposed amendments to Rule 17g–3 would require an NRSRO to provide the Commission with an unaudited annual report describing the steps taken by the NRSRO's designated compliance officer during the fiscal year.[29] Specifically, the amendments would add a new paragraph (a)(7)(i) to Rule 17g–3, which would require an NRSRO to provide the Commission with a report describing the steps taken by the NRSRO's designated compliance officer during the fiscal year to:

- Administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act (15 U.S.C. 78o–7(g) and (h)); [30] and
- Ensure compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act.[31]

These are the areas of responsibility for the designated compliance officer prescribed in Section 15E(j) of the Exchange Act.[32] The report would require a description of the steps taken by the compliance officer during the most recently ended fiscal year to fulfill these responsibilities. As noted above, the purpose of the report is to impose a yearly discipline under which the compliance officer must describe the steps taken to fulfill the officer's statutory responsibilities. The Commission's goal in proposing this amendment is to further enhance the compliance function within the NRSRO by prescribing a process that promotes the active engagement of the compliance officer in reviewing the NRSRO's compliance with internal policies and procedures and with the securities laws and rules and regulations.

The first area of responsibility of the compliance officer under Section 15E(j) of the Exchange Act—to administer the policies and procedures that are required pursuant to Sections 15E(g) and (h) of the Exchange Act—is identified in proposed new paragraph (a)(7)(i)(A) of Rule 17g–3. Sections 15E(g) and (h) of the Exchange Act require an NRSRO to establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of the business of the NRSRO, to prevent the misuse of material nonpublic information and to address and manage any conflicts of interest, respectively.[33] The Commission preliminarily believes that requiring the designated compliance officer to describe the steps taken during the fiscal year in this area of responsibility could, to the extent it encourages the compliance officer to undertake more rigorous compliance reviews, uncover compliance weaknesses with respect to the treatment of material nonpublic information and the management of conflicts of interest by the NRSRO. This would afford the NRSRO the opportunity to consider whether corrective action is necessary to remediate such weaknesses.

The second area of responsibility of the compliance officer under Section 15E(j) of the Exchange Act—to ensure compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act—is identified in proposed new paragraph (a)(7)(i)(B) of Rule 17g–3. The Commission preliminarily believes that requiring the designated compliance officer to describe the steps taken during the fiscal year to meet this responsibility could, to the extent it encourages the compliance officer to undertake more rigorous compliance reviews, assist the NRSRO in identifying areas where its activities may be in contravention of securities laws and regulations and, therefore, allow it to take appropriate action. The goal of the proposed compliance report is to enhance the compliance function and potentially mitigate compliance failures when they occur. The Commission preliminarily

[26] 17 CFR 240.17g–3(a)(2)–(6). Under Rule 17g–3, the only required audited report is the NRSRO's financial statements as of its most recent fiscal year. 17 CFR 240.17g–3(a)(1).

[27] 15 U.S.C. 78o–7(j).

[28] The Commission also notes that other areas of the Commission's rules and regulations also require an annual report by a chief compliance officer with respect to investment companies and investment advisers. *See generally,* Rule 38a–1, 17 CFR 270.38a–1, and Rule 206(4)–7, 17 CFR 275.206(4)–7.

[29] *See* 15 U.S.C. 78o–7(j).

[30] *See* proposed Rule 17g–3(a)(7)(i)(A).

[31] *See* proposed Rule 17g–3(a)(7)(i)(B).

[32] 15 U.S.C. 78o–7(j).

[33] *Id.*

believes that the proposed report the designated compliance officer would be required to furnish may serve as an incentive to further strengthen the NRSRO's existing compliance program.

The Commission notes that the size and scope of an NRSRO's existing compliance program would vary depending on the size and complexity of the NRSRO. Larger NRSROs with comprehensive compliance programs may already periodically review portions of their compliance programs. In contrast, smaller NRSROs may have less extensive compliance programs because they have simpler organizational structures, fewer employees and fewer sources of revenue than larger NRSROs, which may be part of a complex global organization with thousands of employees. Therefore, while the Commission believes that the proposed report would serve as incentive to further strengthen each NRSRO's existing compliance program, the extent of the effect of the proposed report on improving an NRSRO's existing compliance program may vary from one NRSRO to another.

B. Proposed New Paragraph 17g–3(a)(7)(ii)

The proposed amendment to Rule 17g–3 also would set forth specific items to be included in the proposed new report under Rule 17g–3(a)(7). In requiring the inclusion of certain information, the Commission does not intend to dictate how a designated compliance officer should fulfill the officer's responsibilities as set forth in the Rating Agency Act. The Commission expects the designated compliance officer to design and execute a compliance program taking into account: The business of the NRSRO; the procedures and methodologies used by the NRSRO to determine credit ratings; the NRSRO's size; the NRSRO's (and its affiliates') conflicts of interest; and the complexity of the NRSRO's operations. The Commission believes that the information that would be required in the report is the type of information a compliance program would generate regardless of the specific design of a particular program.

More specifically, the amendments to Rule 17g–3 would include new paragraph (a)(7)(ii), which would require that the report include:

- A description of any compliance reviews of the activities of the NRSRO;
- The number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such matter;
- A description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO; and
- A description of the persons within the NRSRO who were advised of the results of the reviews.

The first item the Commission is proposing to require in the report is a description of any compliance reviews of the activities of the NRSRO.[34] One of the functions of a typical compliance department is to proactively review business activities to identify potential regulatory, compliance, and reputational risks and to design ways to minimize such risks.[35] The Commission intends that the designated compliance officer would describe all such reviews conducted during the most recently ended fiscal year. Therefore, this description would provide the Commission with an understanding of the scope of the designated compliance officer's reviews of the NRSRO's activities and possibly highlight any areas that were not reviewed.

The second item the Commission is proposing be included in the report is the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such matter. The Commission preliminarily intends a ''material compliance matter'' to mean a determination by the NRSRO or a person within the NRSRO that there has been a violation of the securities laws [36] or the rules thereunder or a failure to adhere to the policies, procedures, or methodologies established, maintained and enforced by the NRSRO to, for example, determine credit ratings, prevent the misuse of material nonpublic information, manage conflicts of interest, and comply with the Commission's NRSRO rules.[37] A material compliance matter also would include a determination that there was a weakness in the design or implementation of the policies and procedures of the NRSRO.[38] The proposed requirement to report a material compliance matter would be designed to alert the Commission to issues identified by the designated compliance officer that may raise questions about the integrity of the NRSRO's activities and operations. It also could assist the Commission's oversight of NRSROs to the extent a reported material compliance matter is one that could arise in other NRSROs because, for example, it relates to a new type of debt instrument that is being rated by more than one NRSRO or involves potentially inappropriate interactions with an issuer that hired several NRSROs to rate its securities. Finally, the Commission preliminarily believes that requiring the proposed report to include the number of material compliance matters identified would provide Commission examiners with an additional tool to assist them in identifying possible trends and issues with respect to material compliance matters at an NRSRO after the first year of reporting. For example, numerous material compliance violations over a period of years could be indicative of possible lax compliance at an NRSRO.

The third item the Commission is proposing be included in the report is a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO.[39] The Commission preliminarily intends ''remediation measures'' to include changes made by the NRSRO in response to the identification of a material compliance matter that are designed to prevent the re-occurrence of a similar material compliance matter. The reporting of these measures would assist the Commission in evaluating the risk of re-occurrences. It also could shed a light on potential ''best practices'' for mitigating the risk of future material compliance matters. Further, it is designed to reinforce the discipline of an NRSRO to review for potential material compliance matters and take steps to address them when they occur.

The fourth item the Commission is proposing to include in the report is a description of the persons within the NRSRO who were advised of the results

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[34] *See* proposed Rule 17g–3(a)(7)(ii)(A).

[35] *See e.g., White Paper on the Role of Compliance,* Securities Industry Association, Compliance and Legal Division (October 2005); available at *http://www.sifmacl.org/attachments/articles/8/Role%20of%20Compliance.pdf.*

[36] The term ''securities laws'' is defined in Section 3(a)(47) of the Exchange Act.

[37] *See e.g.,* 17 CFR 270.38a–1(e)(2). Rule 38a–1 prescribes compliance procedures and practices for investment companies registered with the Commission under the Investment Company Act of 1940. Paragraph (a)(4) of Rule 38a–1 requires the investment company to designate an individual responsible for administering the fund's policies and procedures to, among other things, prevent violation of the Federal Securities Laws by the fund (the fund's ''chief compliance officer''). Paragraph (a)(4)(iii) of Rule 38a–1 requires the fund's chief compliance officer to provide a written report to the fund's board, at least annually, that addresses, among other things, each ''Material Compliance Matter'' that occurred since the last report. Paragraph (e)(2) of Rule 38a–1 defines a ''Material Compliance Matter'' to be, among other things, a violation of the Federal Securities Law by the fund or its employees, a violation of the policies and procedures of the fund, or a weakness in the implementation or design of the policies and procedures of the fund.

[38] *Id.*

[39] *See* proposed Rule 17g–3(a)(7)(ii)(C).

of the reviews. The Commission intends that the description of the persons who were advised of the results of the reviews at the NRSRO would include only key personnel, *i.e.,* those who have the authority to act on the results of the reviews or direct others to act. The Commission does not intend that the persons advised of the results of the reviews would be so broad in scope as to include persons such as administrative employees, for example, who may have typed a report related to a material compliance matter.

The information with respect to those persons who were advised of the results of reviews is designed to provide the Commission with an understanding of how the NRSRO responds to material compliance matters and the role and structure of the compliance program within the NRSRO. For example, it would indicate whether the compliance officer reported the matters to the NRSRO's board or senior management or only to the business unit that underwent the compliance review. This is designed to promote the appropriate escalation of compliance issues to the management of the NRSRO. The Commission also believes that this proposed information would be a useful tool for examiners to focus examination resources on practices related to material compliance matters reported and assist in making risk-based decisions on whether to initiate an examination of a particular NRSRO. The Commission notes that this information would only be one of many factors the Commission's exam staff may use to determine the particular focus of an exam.

C. Proposed Amendment to Paragraph 17g–3(b)

The Commission also is proposing to amend paragraph (b) of Rule 17g–3 to create two subparagraphs, Rule 17g–3(b)(1) and (b)(2).[40] Subparagraph (b)(1) would carry forward, unchanged, the requirement in current Rule 17g–3(b). The current text of Rule 17g–3(b) requires that an NRSRO must attach to each financial report furnished pursuant to paragraphs (a)(1) through (a)(6) of Rule 17g–3 a signed statement by a duly authorized person associated with the NRSRO stating that the person has responsibility for the financial report and, to the best knowledge of the person, the financial report fairly presents, in all material respects, the financial conditions, results of operations, cash flows, revenues, analyst compensation, and credit rating actions of the NRSRO for the period presented. This requirement does not specify who within the NRSRO should have responsibility for the reports and for providing the required signed statement.

Proposed subparagraph (b)(2) would establish a similar requirement for a signed statement to accompany the report under proposed new paragraph (a)(7) to Rule 17g–3, but would specify that the designated compliance officer is required to provide that statement. Specifically, proposed paragraph (b)(2) of Rule 17g–3 would require that an NRSRO attach to the report furnished pursuant to proposed paragraph (a)(7) of Rule 17g–3 a signed statement by the designated compliance officer of the NRSRO stating that the officer has responsibility for the report and, to the best knowledge of the designated compliance officer, the report fairly presents, in all material respects, the information in paragraph (a)(7)(ii) of Rule 17g–3 for the period presented. The Commission preliminarily believes that the designated compliance officer should have responsibility for providing the statement since the information to be submitted in the report is directly within that individual's statutorily mandated responsibilities under Section 15E(j) of the Exchange Act; namely, to administer the NRSRO's policies and procedures and to ensure compliance with the securities laws and regulations.

D. Summary of Amendments to Rule 17g–3 and Request for Comment

The Commission is proposing these amendments to Rule 17g–3 under its authority to require an NRSRO to ''make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act].'' [41] The Commission preliminarily believes these proposed amendments are necessary or appropriate in the public interest, for the protection of investors and in furtherance of the Exchange Act because they are designed to further improve the quality of credit ratings and help protect the integrity of the credit rating process by requiring that an NRSRO describe the steps taken during the fiscal year by the designated compliance officer to administer required policies and procedures and to ensure compliance with the securities laws and regulations.

The Commission preliminarily believes that requiring the designated compliance officer to provide such a report would encourage a more rigorous compliance program and, thereby, promote the identification of compliance failures and weaknesses in the NRSRO's policies and procedures. In addition, the reporting requirements may encourage an NRSRO to promptly resolve compliance issues identified, and thereby improve the quality and integrity of the NRSRO's credit ratings and credit rating processes.[42]

The proposed rule amendments also would further enhance the Commission's oversight of NRSROs by providing the Commission staff an additional resource with which to evaluate the performance of the designated compliance officers in carrying out their statutory responsibilities prescribed in Section 15E(j) of the Exchange Act. Finally, the proposed report would help identify areas within the NRSRO that Commission staff examiners may want to include within the scope of their examinations and that could be indicative of potentially broader issues across NRSROs.

The Commission generally requests comment on all aspects of these proposed amendments. In addition, the Commission requests comment on the following questions related to the proposal:

- Should the proposal require that the report be furnished to the NRSRO's board or a body performing similar functions of a board or to the NRSRO's senior management in addition to requiring that it be furnished to the Commission or as an alternative to it being furnished to the Commission? Could the requirement to furnish the report to the Commission alter the way the compliance officer conducts compliance reviews or reports the results of those reviews to others within the NRSRO? Would the requirement that it be furnished to the Commission potentially impact the designated compliance officer's incentive to perform a comprehensive and in depth review of the NRSRO's activities, policies, and procedures or to identify material compliance matters? Would requiring the report instead be sent to the board, to a similar body, or to senior management result in a more or less comprehensive review?
- Should the Commission require other items to be included in the report in addition to those prescribed in proposed paragraph (a)(7)(ii) of Rule 17g–3? Commenters believing this

[40] *See* proposed Rule 17g–3(b)(1) and (2).

[41] *See* Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

[42] The Commission notes that this information would only be one of many factors the Commission's exam staff may use to determine the particular focus of an exam.

would be beneficial should specifically identify the additional items and describe how the additional information would be useful to the Commission or to the NRSRO.

• Should the Commission exclude any of the items currently identified in proposed paragraph (a)(7)(ii) of Rule 17g–3? Commenters believing this would be beneficial should specifically identify the items to be deleted and describe why they would not be useful information for the Commission or the NRSRO?

• Should the Commission define the term ''material compliance matter'' in Rule 17g–3? If so, what should the definition be? Alternatively, is the interpretation of the term ''material compliance matter'' set forth in the release sufficient and appropriate? Should there be limitations on what constitutes a material compliance matter? If so, what should these limitations be? For example, are there securities laws violations that do not rise to the level of concern that they would need to be reported? If so, should such violations be reported if the number of occurrences passes a certain threshold? How should the Commission evaluate what that threshold would be (*e.g.* taking into account the number of occurrences and the severity of the violation)?

• As noted above, the Commission has proposed an interpretation of the category of person that would trigger the reporting requirement if such person were apprised of the finding of the compliance officer. Is the proposed interpretation sufficiently clear to indicate when the reporting requirement applies? For example, should the rule specify that it is a decision maker, someone with authority to implement remedial measures, or some other defined category of person? How should that category be defined?

• Should the Commission permit or require someone other than the designated compliance officer certify the report? If so, which person(s) should it be?

• To what extent, if any, should the designated compliance officer be able to rely on subcertifications? What purpose would the subcertifications serve? In some cases, would the designated compliance office not have all the relevant information in order to sign the statement required by proposed Rule 17g–3(b)(2) without subcertifications? If this is true, would this in some way negate any of the objectives of the proposed amendments to Rule 17g–3?

• What effect would the proposed requirement to furnish the report to the Commission have on the designated compliance officer's duties? How could any adverse effects be addressed?

• Should the Commission as an alternative to the proposed report from the compliance officer consider proposing a requirement that an independent third party perform a review of the NRSRO's adherence to its policies and procedures and its compliance with the securities laws. Commenters who believe such a requirement would be appropriate are asked to provide data with respect to the costs and benefits associated with such a review.

III. Amendments to the Instructions to Form NRSRO

The Commission is proposing to amend the instructions for Exhibit 6 to Form NRSRO to require a credit rating agency in an application for registration as an NRSRO or an NRSRO providing its annual update to disclose: (1) The percentage of the net revenue of the applicant/NRSRO attributable to the 20 largest users of credit rating services of the applicant/NRSRO; and (2) the percentage of the net revenue of the applicant/NRSRO attributable to other services and products of the applicant/NRSRO. In conjunction with this proposed amendment to the instructions to Exhibit 6, the Commission is proposing to move the definitions of certain terms currently included in the instructions to Exhibit 10 to the ''Explanation of Terms'' section of the Form NRSRO Instructions in order to make those definitions applicable to Form NRSRO as a whole.

A credit rating agency that seeks to register as an NRSRO must furnish an application for registration to the Commission. Section 15E(a)(1)(A) of the Exchange Act provides that the credit rating agency must furnish the application in a form prescribed by Commission rule.[43] After registration, the credit rating agency—now an NRSRO—must publicly disclose most of the information in its application.[44] Section 15E(b)(1) of the Exchange Act requires the NRSRO to promptly amend the application if, after registration, any information or document provided as part of the application becomes materially inaccurate.[45] Section 15E(b)(2) of the Exchange Act provides that the information on credit ratings performance statistics required to be disclosed in the application pursuant to Section 15E(a)(1)(B) of the Exchange Act must be updated annually.[46] In addition, Section 15E(b)(2) of the Exchange Act requires an NRSRO to furnish the Commission with an amendment to its registration not later than 90 days after the end of each calendar year (the ''annual certification'').[47] This section further provides that the NRSRO must (1) certify that the information and documents provided in the application for registration continue to be accurate and (2) list any material change to the information and documents during the previous calendar year.[48]

With respect to the contents of the application, Section 15E(a)(1)(B) of the Exchange Act prescribes certain minimum information the applicant must provide in the application. Furthermore, Section 15E(a)(1)(B)(x) of the Exchange Act provides that the Commission can require any other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.[49] In the Commission's initial rulemaking implementing the Rating Agency Act—which established the registration and oversight program for NRSROs—the Commission adopted Rule 17g–1 and Form NRSRO and its accompanying instructions.[50] In February 2009, the Commission amended Form NRSRO to require additional disclosures.[51]

Rule 17g–1 prescribes, among other things, how a credit rating agency must apply to be registered with the Commission as an NRSRO, keep its information up-to-date after registration, and comply with the statutory requirement to furnish the Commission with an annual certification.[52] In particular, all of these actions must be accomplished by furnishing the Commission with a Form NRSRO. As described below, Form NRSRO requires information about the credit rating agency applying for registration and, after registration, about the NRSRO, including the information required under 15E(a)(1)(B) of the Exchange Act and additional information prescribed by the Commission.[53]

Form NRSRO contains 8 line items and 13 exhibits. The line items require information about the applicant/NRSRO such as its address; corporate form; credit rating affiliates that would be, or

[43] 15 U.S.C. 78o–7(a)(1)(A).

[44] 17 CFR 240.17g–1(i).

[45] 15 U.S.C. 78o–7(b)(1).

[46] *Id.*

[47] 15 U.S.C. 78o–7(b)(2).

[48] *Id.*

[49] 15 U.S.C. 78o–7(a)(1)(B).

[50] *See June 2007 Adopting Release,* 72 FR at 33566–33582.

[51] *See February 2009 Adopting Release,* 74 FR at 6457–6460.

[52] *See* 17 CFR 240.17g–1.

[53] 15 U.S.C. 78o–7(a)(1)(B).

are, a part of its registration; the classes of credit ratings for which it is seeking to be, or is, registered as an NRSRO; the number of credit ratings it has issued in each class and the date it began issuing credit ratings in each class; and whether it or a person associated with it has committed or omitted any act, been convicted of any crime, or is subject to any order or findings identified in Section 15(d) of the Exchange Act.[54]

The 13 exhibits to Form NRSRO elicit the information required under Sections 15E(a)(1)(B)(i) through (ix) of the Exchange Act and additional information prescribed by the Commission.[55] Exhibits 1 through 9 require certain information about the applicant/NRSRO, including credit rating performance statistics, its methodologies and procedures used to determine credit ratings, its policies and procedures designed to prevent the misuse of material non-public information, its organizational structure, its code of ethics, the conflicts of interest inherent in its business operations, its policies and procedures for managing those conflicts of interest, summary data about the qualifications of its credit analysts, and the identity of its chief compliance officer. An NRSRO must make Exhibits 1 through 9 publicly available after it is registered.

Exhibits 10 through 13 require financial information about the applicant credit rating agency that the Commission evaluates in deciding whether it can make the finding required under Section 15E(a)(2)(C)(ii) of the Exchange Act[56] that the applicant fails to maintain adequate financial and managerial resources to consistently produce credit ratings with integrity and to materially comply with the procedures and methodologies disclosed pursuant to Section 15E(a)(1)(B) of the Exchange Act[57] and established pursuant Sections 15E(g), (h), (i) and (j) of the Exchange Act.[58] These Exhibits are not required to be publicly disclosed by the NRSRO after the applicant is granted registration as an NRSRO. If registration is granted, the NRSRO is required to furnish financial information to the Commission in an annual report required by Rule 17g–3 that is similar to the information required in Exhibits 10 through 13.[59] The rules do not require that the annual reports furnished to the Commission pursuant to Rule 17g–3 be made publicly available by the NRSRO.[60]

The Commission is proposing amending the instructions for Exhibit 6 to augment the information about conflicts of interest currently required to be disclosed in Form NRSRO. The Commission prescribed the current requirements for Exhibit 6 to implement Section 15E(a)(1)(B)(vi) of the Exchange Act, which requires that an application for registration contain information regarding any conflict of interest relating to the issuance of credit ratings by the applicant/NRSRO.[61] The Exchange Act does not define or identify the types of conflicts of interest that should be disclosed pursuant to Section 15E(a)(1)(B)(vi) of the Exchange Act.[62] The Commission, in adopting Form NRSRO and its accompanying instructions, required that an applicant/NRSRO provide in Exhibit 6 a list of the types of conflicts of interest relating to its issuance of credit ratings.[63] To assist the applicant/NRSRO and promote consistent disclosures, the instructions to the Exhibit contain a list of potential conflicts of interest that may apply to an applicant/NRSRO based on its business model and activities.[64] The instructions further provide that the applicant/NRSRO can use the descriptions provided in the instructions to identify an applicable conflict of interest.[65] An applicant/NRSRO also can choose to provide its own description of the conflict or provide further explanations to one of the descriptions in the instructions.[66] Finally, Exhibit 6 to Form NRSRO is one of the public exhibits that the NRSRO is required to make readily accessible to the public and to keep current through furnishing updated information on Form NRSRO.[67]

One purpose of the disclosure in Exhibit 6 is to alert users of credit ratings to the potential conflicts of interest inherent in the NRSRO's business model.[68] The information also is designed to allow users of credit ratings to assess an NRSRO's procedures for managing conflicts by comparing the types of conflicts disclosed in Exhibit 6 with its procedures for managing conflicts of interest disclosed in Exhibit 7.[69]

The disclosure also is designed to assist the Commission in evaluating whether an NRSRO has sufficient financial and managerial resources to comply with the procedures for managing conflicts of interest required under Section 15E(h) of the Exchange Act.[70] Being informed of the conflicts of interest identified by the applicant/NRSRO in Exhibit 6 to Form NRSRO assists the Commission in evaluating whether the disclosed financial and managerial resources of the NRSRO appear to be sufficient in light of the magnitude and extent of any conflicts.[71]

The Commission is proposing to amend Exhibit 6 to require an applicant/NRSRO to disclose information regarding the revenues it receives from major clients as well as the revenues attributable to services other than determining credit ratings. The proposed new disclosure is designed to assist users of NRSRO credit ratings in assessing the conflicts of interest, including the potential magnitude of such conflicts, inherent in a given NRSRO's business operations. In particular, an NRSRO's disclosure of information about revenues received from major clients and revenues attributable to other services provided to clients would allow users of credit ratings to have more information about the dimensions of the conflict arising from NRSROs being paid to determine credit ratings as well as the conflict of offering other services to persons who pay for credit ratings. It would also provide investors and other users of credit ratings more specific information about the extent to which NRSRO revenues are from a concentrated group of clients. Users of NRSRO credit ratings could then use this information to evaluate the integrity of the credit ratings issued by the NRSRO and whether they believe the NRSRO is effectively managing these conflicts of interests. Also, an NRSRO's disclosure of this information in Exhibit 6 to Form NRSRO would allow users of credit ratings to ascertain the types and dimensions of a given NRSRO's conflicts of interest. The ready availability of this information in a single location would facilitate the evaluation by users of credit ratings of the probability that the conflicts of interest could adversely impact the integrity of the NRSRO's credit ratings

[54] 15 U.S.C. 78o(d).

[55] 15 U.S.C. 78o–7(a)(1)(B)(i)–(x).

[56] 15 U.S.C. 78o–7(a)(2)(C)(ii).

[57] 15 U.S.C. 78o–7(a)(1)(B).

[58] 15 U.S.C. 78o–7(g), (h), (i) and (j).

[59] *See* 17 CFR 240.17g–3 and 15 U.S.C. 78o–7(k).

[60] *See* Rule 17g–3 and 15 U.S.C. 78o–7(k); *see also June 2007 Adopting Release,* 72 FR at 33590.

[61] *See* 15 U.S.C. 78o–7(a)(1)(B)(vi); *June 2007 Adopting Release,* 72 FR at 33577.

[62] *Id.*

[63] *See* Form NRSRO Instructions for Exhibit 6.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *See* Form NRSRO General Instructions.

[68] *See June 2007 Adopting Release,* 72 FR at 33577.

[69] *Id.*

[70] 15 U.S.C. 78o–7(h).

[71] *See* Section 15E(a)(2)(C) of the Exchange Act (15 U.S.C. 780–7(a)(2)(C)); *June 2007 Adopting Release,* 72 FR at 33577.

and credit rating processes. Users of credit ratings could then judge for themselves whether they believe that certain conflicts of interests are adversely impacting the integrity of an NRSRO's credit ratings and credit ratings processes based on their evaluation of the information disclosed in Exhibit 6.

Because the proposed amendment would require that the information be provided as part of the application to register as an NRSRO, the Commission would be able to review the disclosures before they would be required to be made public (ten business days after the credit rating agency is granted registration).[72] The information also would assist the Commission in evaluating whether an applicant has sufficient financial and managerial resources to comply [73] with the procedures for managing conflicts of interest required under Section 15E(h) of the Exchange Act after consideration of the conflicts of interest identified by the applicant, including the magnitude of such conflicts.[74]

The Commission proposes dividing Exhibit 6 into a Part A and a Part B. Part A would require an applicant/NRSRO to provide the information on conflicts of interest currently required to be disclosed by Exhibit 6. Part B would require an applicant/NRSRO to provide new disclosures relating to revenues from its most recently ended fiscal year. In particular, Part B to Exhibit 6 would require an applicant/NRSRO to provide the following disclosures, as applicable:

- The percentage of the applicant/NRSRO's net revenue attributable to the 20 largest users of credit rating services of the applicant/NRSRO; and
- The percentage of the applicant/NRSRO's revenue attributable to services and products other than credit rating services of the applicant/NRSRO.

To perform the calculations to determine these disclosures, the applicant/NRSRO would be required to use the definitions of ''net revenue'' and ''credit rating services'' currently specified in Exhibit 10 to Form NRSRO.[75] The Commission is proposing to move these definitions from the instructions to Exhibit 10 to the ''Explanation of Terms'' section of the Form NRSRO Instructions in order to make them applicable to Form NRSRO as a whole, including the proposed amendment to Exhibit 6. The Commission does not propose otherwise altering those definitions. The Commission believes that it is appropriate to place these definitions in the Explanation of Terms section of the Form NRSRO Instructions because, in addition to the NRSROs being familiar with these definitions, the definitions are appropriate in light of the disclosure objectives of the proposed rule.[76] Finally, the Commission notes that using the same terms throughout the Form NRSRO Instructions would promote consistency for comparison purposes with respect to the financial information the applicant/NRSRO furnishes to the Commission.

As defined in the instructions to Exhibit 10 of Form NRSRO, the term ''net revenue'' means revenue earned by the applicant or NRSRO for any type of service or product, regardless of whether related to credit rating services, and net of any rebates and allowances paid or owed to the person by the applicant or NRSRO.[77] The Commission explained in the *June 2007 Adopting Release* that this definition excludes revenues received by affiliates that are not part of the credit rating organization.[78] Also, the intent in defining ''net revenues'' as payables net of any ''rebates or allowances'' was to limit the allowable offsets that reduce net revenue to items that directly reduce a payable on the revenue side and to exclude unrelated payables (*e.g.,* payables for utility bills).[79] Finally, by using the term ''revenue earned'' the Commission stated that the applicant/NRSRO must apply its standard accounting convention for recognizing revenue as this will make revenue calculations consistent across the various financial reports required in Form NRSRO and Rule 17g–3.[80] As discussed above, the Commission is proposing to move the definition of ''net revenue'' from the instructions to Exhibit 10 of Form NRSRO to the ''Explanation of Terms'' section of the Form NRSRO Instructions, making the definition applicable to Form NRSRO as a whole, including the proposed amendments to Exhibit 6.

As defined in the instructions to Exhibit 10 of Form NRSRO, the term ''credit rating services'' means any of the following: rating an obligor (regardless of whether the obligor or any other person paid for the credit rating); rating an issuer's securities or money market instruments (regardless of whether the issuer, underwriter, or any other person paid for the credit rating); and providing credit ratings, credit ratings data, or credit ratings analysis to a subscriber.[81] The Commission explained in the *June 2007 Adopting Release* that this definition includes—along with persons that pay for credit ratings and subscriptions—persons that are rated, or whose securities or money market instruments are rated, but that did not pay for the credit rating.[82] Even though these persons may not have paid for the credit rating, they potentially could have undue influence on the credit rating agency if they provide substantial net revenue for other services or products.[83] The Commission preliminarily believes that it is appropriate to include these persons within the definition to the proposed amendment to Exhibit 6 to Form NRSRO. By applying the same definitions, the proposed calculations in Exhibit 6 to Form NRSRO would continue to be consistent across the various financial reports required in Form NRSRO and Rule 17g–3. Also, as explained in the *June 2007 Adopting Release,* the term ''subscribers'' in the definition of ''net revenue'' was intended to include persons who pay for credit ratings data and the analysis behind credit ratings because it may be difficult to separate these subscribers from other subscribers.[84] As the Commission has previously noted, credit rating agencies that make their credit ratings publicly available for free sometimes offer subscriptions to receive feeds of the credit ratings or to receive reports detailing the analysis behind the credit ratings.[85] The Commission is proposing to move the definition of ''credit rating services'' from the instructions to Exhibit 10 of Form NRSRO to the ''Explanation of Terms'' section of the Form NRSRO Instructions, making the definition applicable to Form NRSRO as a whole, including the proposed amendments to Exhibit 6.

As noted above, under proposed amendments to the Instructions to Exhibit 6, the applicant/NRSRO would need to make two new types of disclosures. The first proposed new disclosure in Exhibit 6 would require

[72] *See* 17 CFR 240.17g–1(i).

[73] 15 U.S.C. 78o–7(h).

[74] *See* Section 15E(a)(2)(C) Exchange Act (15 U.S.C. 78o–7(a)(2)(C)).

[75] *See* Form NRSRO Instructions for Exhibit 10. The same definitions also are used in Rule 17g–3 for purposes of calculating the list of largest users of credit ratings to be furnished in an NRSRO's annual financial report to the Commission. *See* 17 CFR 240.17g–3(a)(5) and accompanying note.

[76] *See June 2007 Adopting Release,* 72 FR at 33580–33581.

[77] *See* Form NRSRO Instructions for Exhibit 10.

[78] *See June 2007 Adopting Release,* 72 FR at 33580–33581.

[79] *Id.*

[80] *Id.*

[81] *See* Form NRSRO Instructions for Exhibit 10.

[82] *See June 2007 Adopting Release,* 72 FR at 33580–33581.

[83] *Id.*

[84] *Id.*

[85] *Id.*

that an applicant/NRSRO disclose the percentage of net revenue attributable to the 20 largest users of credit rating services of the applicant/NRSRO. The proposed instructions further provide that the applicant/NRSRO would be required to calculate this ratio by dividing the amount of net revenue earned by the applicant/NRSRO attributable the 20 largest users of credit rating services by the total amount of the four classifications of revenue of the applicant as reported in Exhibit 12 to Form NRSRO or in the financial report furnished to the Commission under Exchange Act Rule 17g–3(a)(4).[86] As noted above, Exhibit 12 and Rule 17g–3(a)(4) currently elicit information regarding: (1) Revenue from determining and maintaining credit ratings; (2) revenue from subscribers; (3) revenue from granting licenses or rights to publish credit ratings; and (4) revenue from all other services and products offered by the applicant/NRSRO.[87] The proposed disclosures would be calculated annually, as of the end of the fiscal year of the applicant/NRSRO.

The Commission preliminarily believes that the proposed disclosure of the percentage of net revenue attributable to the 20 largest users of credit rating services of the applicant/NRSRO would provide investors and other users of credit rating services with useful disclosure, as explained below, related to a significant sample of the largest users of credit rating services of the applicant/NRSRO. The Commission preliminarily believes this proposed new disclosure would assist investors and other users of credit ratings by providing them with information concerning the degree to which revenues earned by the NRSRO come from a concentrated base of customers. This could be useful in understanding the conflicts inherent in the NRSRO's business. Specifically, a large percentage of revenues attributable to a concentrated group of clients could increase the potential risk that those clients' contribution to the NRSRO's revenues could influence the objectivity of its credit ratings. Making the degree of this concentration more transparent in Exhibit 6 to Form NRSRO would allow investors and market participants to take this potential risk into account when considering the reliability of the NRSRO's credit ratings. The proposed new disclosures also would assist users of credit ratings in comparing concentration of revenues across all NRSROs.

The second proposed new disclosure in Exhibit 6 to Form NRSRO would require the applicant/NRSRO to disclose the percentage of revenue attributable to other services and products of the applicant/NRSRO. The proposed instructions to Exhibit 6 would provide that the applicant/NRSRO must calculate this ratio by dividing the total amount of revenue earned by the applicant for ''all other services and products'' as reported in Exhibit 12 to Form NRSRO or as reported in the annual financial report furnished to the Commission under Exchange Act Rule 17g–3(a)(4) by the total amount of the four classifications of revenue of the applicant as reported in Exhibit 12 or of the NRSRO as reported in the financial report furnished pursuant to 17g–3(a)(4). As noted above, Exhibit 12 and Rule 17g–3(a)(4) elicit the same information about revenues.[88]

The Commission preliminarily believes this information would be useful to investors and other users of credit ratings because it would provide information about the relative size of revenues an NRSRO earns from providing services other than credit ratings. There is the potential that an NRSRO that obtains substantial revenues from other services might be inclined to favor a client that purchases those other services when determining credit ratings solicited by that client. Consequently, creating greater transparency about the revenues generated from other services could provide increased information to assist investors and other users of credit ratings in assessing the potential risks to the NRSRO's objectivity.

With respect to the two proposed new disclosures, the proposed amended instructions to Form NRSRO would provide that an applicant must provide the information for the fiscal year ending immediately before the date of the applicant's initial application to the Commission. The Commission is proposing this timeframe as it is consistent with the current instructions for the financial information elicited in Exhibits 10, 12, and 13.[89]

Further, after registration, an NRSRO would be required to provide the proposed information as of the end of its most recent fiscal year. As such, the Commission is proposing amendments to the Instructions to Exhibit 6 to provide that after registration, an NRSRO with a fiscal year end of December 31 must update the information in Exhibit 6, Part B, as part of its annual certification. Rule 17g–1(f) requires an NRSRO to furnish the annual certification no later than 90 days after the calendar year.[90] This also is the time frame for NRSROs with December 31 fiscal year-ends to furnish their annual financial reports required pursuant to Rule 17g–3.[91] Moreover, the information furnished in the annual reports would be needed to generate the proposed Exhibit 6 disclosures.

Further, the proposed instructions would require that an NRSRO with a fiscal year end that is not December 31 must provide this information with an Update of Registration no later than 90 days after the end of each fiscal year. These provisions would require the disclosure within 90 days of the closing of an NRSRO's books regardless of whether the year-end is December 31 or some other date. This also is the time frame for NRSROs to furnish their annual financial reports required pursuant to Rule 17g–3.[92]

The Commission is proposing these amendments to Exhibit 6 to Form NRSRO to further implement Section 15E(a)(1)(B)(vi) of the Exchange Act, which requires that an application for registration as an NRSRO contain information regarding any conflict of interest relating to the issuance of credit ratings by the applicant and NRSRO.[93] It also is proposing the amendments, in part, pursuant to Section 15E(a)(1)(B)(x) of the Exchange Act, which provides that the Commission can require any other information and documents as the Commission by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.[94] The proposed disclosures are designed to increase transparency regarding sources of revenue that might create conflicts of interest for an NRSRO, and, thereby, allow investors and users of credit ratings to better assess these potential conflicts of interest that could influence an NRSRO's objectivity in determining credit ratings. Finally, the proposed amendments are designed to enhance

[86] *See* Form NRSRO Instructions for Exhibit 12 and 17 CFR 240.17g–3(a)(4).

[87] *Id.* The Commission intends that an applicant/NRSRO apply its standard accounting convention for recognizing revenue to make revenue calculations consistent across the various financial reports required in Form NRSRO and Rule 17g–3. The Commission notes it is proposing to use the terms revenue and net revenue as originally adopted by the Commission.

[88] *See* Form NRSRO Instructions for Exhibit 12 and 17 CFR 240.17g–3(a)(4).

[89] Exhibit 11 requires financial statements for the three calendar or fiscal years ending immediately before the date of the application. This proposed timeframe also is consistent with the requirements for the reports required to be published by NRSROs in Rule 17g–3(a). 17 CFR 240.17g–3(a).

[90] 17 CFR 240.17g–1(f).

[91] 17 CFR 240.17g–3.

[92] 17 CFR 240.17g–3.

[93] 15 U.S.C. 78o–7(a)(1)(B)(vi).

[94] 15 U.S.C. 78o–7(a)(1)(B).

the disclosures already made by NRSROs in Exhibit 6 to Form NRSRO and to provide users of credit ratings with tools to compare concentrations of revenues across all NRSROs. The proposed additional disclosures would provide more detail about an NRSRO's conflicts of interest, and thereby, allow users of credit ratings to better evaluate the potential risk that an NRSRO's credit ratings could be compromised.

The Commission generally requests comment on all aspects of these proposed amendments. In addition, the Commission requests comment on the following questions related to the proposal.

- Should the proposed disclosure of information about the percentage of revenues attributable to the 20 largest clients use a different number of clients? For example, should it be a lesser number such as the 5, 10, or 15 largest clients or a larger number such as the 25, 30, or 35 largest clients?
- Are the revenues attributable to the 20 largest clients an appropriate proxy for an NRSRO's ''major clients?'' Might there be notable differences between the percentage of revenue attributable to the largest client and the percentage of revenue attributable to, say, the twentieth largest client?
- Would including revenue earned by persons directly or indirectly controlling, controlled by, or under common control with, the NRSRO (*i.e.,* affiliates) in calculating revenues attributable to the 20 largest clients, be useful information for investors and other users of credit ratings?
- Should the proposed disclosure of information about the percentage of revenues derived from services other than determining credit ratings be expanded to include revenues earned by persons directly or indirectly controlling, controlled by, or under common control with, the NRSRO (*i.e.,* affiliates)? If so, would it be useful for investors and other users of credit ratings to have this information?
- If the term affiliate was added to the proposed disclosures in Exhibit 6 to Form NRSRO, should the Commission define the term affiliate? For example, if an NRSRO controlled less than 51% of an entity, should the entity be considered an affiliate? If a natural person controlled or owned an NRSRO, should other entities the individual owns or controls be considered affiliates of the NRSRO for purposes of the proposed rule?
- For the purposes of calculating the percentage of net revenue attributable to the 20 largest users of credit rating services of the applicant/NRSRO in Exhibit 6 to Form NRSRO, should the Commission only count ''users'' to be persons who paid for the service? For example, if the payer of a rating is the underwriter, should the Commission also attribute the payment to the issuer in calculating the percentage of net revenue to the NRSRO for the purpose of showing how much of the NRSRO's revenue is being earned from rating this particular issuer's securities? Similarly, if the payer of the rating is an issuer, should the Commission also attribute the payment to the underwriter in the calculation for purposes of highlighting whether this particular underwriter is a frequent or dominant underwriter that is involved in many deals rated by that NRSRO?
- Would the proposed rule give investors and other users of credit ratings sufficient information to assess the potential risk to objectivity? If not, is there other information that would be useful for this purpose?
- Is it appropriate to use existing definitions of ''net revenue'' and ''credit rating services?''
- Do any other NRSRO services lend themselves more to potential conflicts of interest that could influence the quality of the rating?
- Will the proposed rule generate additional information that is useful to users of NRSRO credit ratings?
- Is Exhibit 6 of Form NRSRO the most practical place for an NRSRO to make the proposed additional disclosures? Are there alternative places where an NRSRO could make these proposed disclosures that would be more useful to an investor or other users of an NRSRO's credit ratings? For example, would it be more useful for investors or other users of credit ratings if the proposed amendments to Exhibit 6 to Form NRSRO were disclosed along with the information required in the new Rule 17g–7?
- Is the most recent fiscal year an appropriate timeframe for the proposed disclosure? If not, what should it be? For example, would it be more appropriate to use the three, five or ten most recently ended fiscal years to provide a trend analysis?

IV. New Rule 17g–7—Credit Rating Reports on Revenues

As discussed in detail in Section VI below, at this time the Commission has determined to defer consideration of action with respect to the proposal, set forth in the *June 2008 Proposing Release,* that would have required an NRSRO to publish a report each time the NRSRO published a credit rating for a structured finance product. Under that proposal, an NRSRO would have been required to disclose in the report how the credit ratings procedures and methodologies and credit risk characteristics for structured finance products differ from those of other types of rated instruments such as corporate and municipal debt securities. As an alternative to publishing the report, an NRSRO would have been allowed to use ratings symbols for structured finance products that differentiated them from the credit ratings for other types of debt securities.[95]

Today, the Commission is proposing a new Rule 17g–7.[96] This new rule would require an NRSRO to make publicly available on its Internet Web site a consolidated report containing information about the revenues earned by the NRSRO and, if applicable, its affiliates as a result of providing services and products to persons that paid the NRSRO to issue or maintain a credit rating. This report would need to be updated annually.

Specifically, proposed Rule 17g–7 consists of three paragraphs: (a), (b), and (c). As described in more detail below, proposed paragraph (a)(1) would require the NRSRO to include in the report: (1) The percent of the net revenue attributable to the person that paid the NRSRO that were earned by the NRSRO during the most recently ended fiscal year from providing services and products other than credit rating services to the person; (2) the relative standing of the person in terms of the person's contribution to the NRSRO's net revenue as compared with other persons that contributed to the NRSRO's net revenues; and (3) the identity of all outstanding credit ratings issued by the NRSRO and paid for by the person. Paragraph (a)(2) of proposed Rule 17g–7 would exempt an NRSRO from publishing the reports if, as of the end of the fiscal year, the NRSRO had no credit ratings outstanding that the NRSRO issued or maintained as a result of a person paying the NRSRO for the issuance or maintenance of the credit ratings. Paragraph (b) of proposed Rule 17g–7 would provide that the NRSRO must prominently include a generic disclosure statement each time the NRSRO publishes a credit rating or credit ratings indicating where on its Internet Web site the consolidated

[95] *See June 2008 Proposing Release,* 73 FR, at 36235. The Commission proposed codifying these requirements in the Code of Federal Regulations (''CFR'') as Rule 17g–7, which would follow existing Rule 17g–6. As discussed in this section, the Commission is today proposing that a different rule be codified as Rule 17g–7 in the CFR. The Commission is proposing to use the title ''Rule 17g–7'' for this proposed new rule in order to maintain the numerical sequence of the current NRSROs rules—Rules 17g–1 through 17g–6.

[96] *Id.*

report required pursuant to paragraph (a) is located. Paragraph (c) of proposed Rule 17g–7 would contain definitions applicable to the section. Specifically, paragraph (c)(1) would define the term ''credit rating services'' and paragraph (c)(2) would define the term ''net revenue.''

The purpose of this proposed rule is to provide users of credit ratings with information to assist them in evaluating the potential risk to the integrity of a credit rating that arises from the conflict inherent when an NRSRO is paid to determine a credit rating for a specific obligor, security, or money market instrument. Specifically, the risk that the revenue generated from the person soliciting the NRSRO to determine the credit rating could compromise the NRSRO's objectivity and cause the NRSRO to determine a higher credit rating than it otherwise would have determined. Under such circumstances, the credit rating may not accurately reflect the NRSRO's true view of the level of credit risk inherent in the obligor, security, or money market instrument being rated. Providing users of credit ratings with the information in this consolidated report would enable them to better assess the degree that a particular credit rating may be subject to this risk.

The increased transparency resulting from the proposed rule also could have the ancillary benefit of helping to mitigate the possibility that a large consumer of the services and products of the NRSRO and its affiliates could successfully use its status to exercise undue influence on the NRSRO. Specifically, by making the potential conflict more transparent to the marketplace, the proposed rule could assist users of credit ratings, market participants, and others in evaluating how credit ratings solicited by large revenue providers are handled by the NRSRO.

A. Proposed Paragraph (a) of Rule 17g–7

Paragraph (a)(1) of proposed Rule 17g–7 would provide that an NRSRO must annually, not later than 90 calendar days after the end of its fiscal year (as indicated on its current Form NRSRO) make publicly available on its Internet Web site a consolidated report that shows, with respect to each person that paid the NRSRO to issue or maintain a credit rating that was outstanding as of the end of the fiscal year, information about the person as described in proposed paragraph (a)(1)(i)–(a)(1)(iii) of proposed Rule 17g–7.

Paragraph (a)(1)(i) of proposed Rule 17g–7 would require an NRSRO to show the percent of the net revenue attributable to the person earned by the NRSRO for the fiscal year from providing services and products other than credit rating services to the person. Paragraph (c)(1) of proposed Rule 17g–7 would define ''credit rating services'' to mean any of the following: ''Rating an obligor (regardless of whether the obligor or any other person paid for the credit rating); rating an issuer's securities or money market instruments (regardless of whether the issuer, underwriter, or any other person paid for the credit rating); and providing credit ratings, credit ratings data, or credit ratings analysis to a subscriber.'' This is the current definition of ''credit rating services'' contained in the instructions for Exhibit 10 to Form NRSRO.[97]

Paragraph (c)(2) of proposed Rule 17g–7 would define the term ''net revenue'' to mean ''revenue earned for any type of service or product provided to a person, regardless of whether related to credit rating services, and net of any rebates and allowances paid or owed to the person.'' This definition mirrors the definition of ''net revenue'' in the instructions to Exhibit 10 to Form NRSRO and in Rule 17g–3. This information about the person set forth in proposed Rule 17g–3(a)(1)(i) is required to be made publicly available in the consolidated report posted on the NRSRO's Internet Web site and is designed to benefit users of credit ratings by alerting them to the potential risk that the revenues earned by the NRSRO could influence the objectivity of the NRSRO in determining credit ratings paid for by the person.

The method of calculating net revenue would be the same for the requirements in Form NRSRO (existing and proposed herein), Rule 17g–3, and proposed Rule 17g–7. Consequently, just as with the existing definitions in Form NRSRO and Rule 17g–3, the inclusion in the proposed Rule 17g–7 definition of revenues net of ''rebates or allowances'' is intended to limit offsets that reduce net revenue to items that directly reduce a payable on the revenue side and to exclude unrelated payables (*e.g.,* payables for utility bills). In other words, the definition of ''net revenues'' is intended to be the same as used in Form NRSRO and Rule 17g–3 in all respects.

To generate the information on revenues earned by the NRSRO from providing services other than credit rating services to the person that paid for the issuance or maintenance of a credit rating, the NRSRO would be required to undertake a number of steps, as described below, no later than 90 calendar days after the end of its fiscal year or prior to its registration as an NRSRO. These steps would be based on the NRSRO's results for the most recently ended fiscal year, consistent with other information disclosed on Form NRSRO or furnished to the Commission under Rule 17g–3. In particular, under paragraph (a)(3)(i) of proposed Rule 17g–7, the NRSRO would be required to take the following steps, respectively, within 90 days of closing its books or before its registration as an NRSRO:

- Calculate the net revenue attributable to the person earned by the NRSRO for the fiscal year from providing services and products other than credit rating services to the person;
- Calculate the net revenue attributable to the person earned by the NRSRO for the fiscal year from providing all services and products, including credit rating services, to the person; and
- Divide the amount calculated pursuant to paragraph (a)(3)(i)(A) by the amount calculated pursuant to paragraph (a)(3)(i)(B) and convert that quotient to a percent.

These steps would generate the information the NRSRO would use in the report on the percent of revenues attributable to providing non-credit rating services to a person that paid the NRSRO for the issuance or maintenance of a credit rating. The following is an example of how the information would be generated for purposes of the proposed report with respect to a hypothetical NRSRO, ABC Credit Rating Agency, and a consumer of ABC Credit Rating Agency's services and products, XYZ Corp. For the purposes of the first step, prescribed in paragraph (a)(3)(i)(A) of proposed Rule 17g–7, assume ABC Credit Rating Agency earned gross revenues of $220,000 from providing services other than credit rating services to XYZ Corp. Assume further that ABC Credit Rating Agency agreed to rebate $20,000 of that amount back to XYZ Corp. because it exceeded $100,000. In this case the net revenue attributable to providing services other than credit rating services to XYZ Corp. would be $200,000.

Next, for the purposes of the second step, prescribed in paragraph (a)(3)(1)(B) of proposed Rule 17g–7, assume ABC Credit Rating Agency earned gross revenues of $1,100,000 from providing all services to XYZ Corp. Assume further that ABC Credit Rating Agency agreed to rebate $100,000 of that amount

[97] *See* Form NRSRO Instructions for Exhibit 10.

back to XYZ Corp because it exceeded $100,000. In this case the net revenue attributable to providing all services and products to XYZ Corp. would be $1,000,000.

The next step, prescribed in paragraph (a)(3)(i)(C) of proposed Rule 17g–7, would be for ABC Credit Rating Agency to divide $200,000 by $1,000,000 to calculate the percent of the total revenues earned from providing all services to XYZ Corp. attributable to providing services other than credit rating services. Under the hypothetical, this calculation would yield a figure of 20%. Consequently, for purposes of the consolidated report, the NRSRO would need to indicate that 20% of the net revenues earned from providing services to XYZ Corp. was for services other than credit rating services.

Paragraph (a)(1)(ii) of proposed Rule 17g–7 would require an NRSRO to indicate in the consolidated report to be made publicly available on its Internet Web site the relative standing of the person that paid the NRSRO to issue or maintain a credit rating in terms of the amount of net revenue earned by the NRSRO attributable to the person as compared to other persons that provided the NRSRO net revenues. To compute this information, the NRSRO would need to take the following steps not more than 90 calendar days after the end of each fiscal year:

- For each person from whom the NRSRO earned net revenue during the fiscal year, calculate the net revenue attributable to the person earned by the NRSRO for the fiscal year from providing all services and products, including credit rating services, to the person;
- Make a list that sorts the persons subject to the calculation above in order from largest to smallest in terms of the amount of net revenue attributable to the person, as determined pursuant to that calculation; and
- Divide the list generated above into the following categories: top 10%, top 25%, top 50%, bottom 50%, and bottom 25% and determine which category contains the person.

These steps would generate the information to indicate the relative standing of each person that paid the NRSRO to issue or maintain a credit rating that was outstanding as of the fiscal year end. The Commission preliminarily believes that the proposed categories (top 10%, top 25%, top 50%, bottom 50%, and bottom 25%) would be helpful to investors or other users of credit ratings because the rankings provide insight into customers that—given the level of revenues they provide to the firm—may be able to exercise greater undue influence.

This calculation would be performed as follows. Assume the NRSRO earned revenues from 1,000 clients during the most recently ended fiscal year. Moreover, assume that the greatest amount of net revenue derived from a client was $2,500,000 and that the 100th largest amount of net revenue derived from a client was $900,000. In this case, using hypothetical above, XYZ Corp.—from which the NRSRO derived $1,000,000 in net revenue—would rank somewhere between the largest and 100th largest clients of the NRSRO. Consequently, because there are 1,000 clients total, XYZ Corp. would need to be classified in the consolidated report as being in the top 10% of the persons that provided the NRSRO with net revenue in terms of the amount of net revenue.

Paragraph (a)(1)(iii) of proposed Rule 17g–7 would require an NRSRO to identify for each person listed in the consolidated report all outstanding credit ratings paid for by that person, which the NRSRO would need to determine in accordance with proposed paragraph (a)(3)(iii) of Rule 17g–7. Specifically, the NRSRO would need to identify by name of obligor, security, or money market instrument and, as applicable, CIK number, CUSIP, or ISIN each outstanding credit rating generated as a result of the person paying the NRSRO for the issuance or maintenance of the credit rating and attribute the outstanding credit rating to the person. For example, assume XYZ Corp. had paid the NRSRO to issue and maintain credit ratings for three different classes of debt instruments issued by XYZ Corp. and there were credit ratings outstanding for each of these classes of debt instruments as of the end of the NRSRO's fiscal year. In this case, each of these debt instruments would need to be identified by name and CUSIP number and associated with XYZ Corp. on the consolidated report.

Proposed paragraph (a)(2) of Rule 17g–7 would provide an exemption to the requirement to generate the consolidated report or to include with the publication of a credit rating the statement required by paragraph (b) of proposed Rule 17g–7 (discussed below) if, as of the end of the fiscal year, there were no credit ratings of the NRSRO outstanding that were issued or maintained as a result of a person paying the NRSRO for the issuance or maintenance of the credit rating. For example, a subscriber-paid NRSRO may be exempt from the requirements of the proposed rule if it is not paid by obligors, issuers, underwriters or investors to issue or maintain specific credit ratings. This would mean that a subscriber-paid NRSRO would not need to generate the report or make the generic statement, provided it only was paid by subscribers to access its credit ratings. However, it would need to generate the report if it was paid, for example, by an investor to issue or maintain a credit rating on a specific debt instrument.

B. Proposed Paragraph (b) of Rule 17g–7

Proposed paragraph (b) of Rule 17g–7 would provide that an NRSRO must prominently include a statement that identifies where on its Internet Web site the consolidated report required pursuant to paragraph (a)(1) is located each time the NRSRO publishes a credit rating or credit ratings in a research report, press release, announcement, database, Internet Web site page, compendium, or any other written communication that makes the credit rating publicly available for free or a reasonable fee. Specifically, the NRSRO would need to include the following statement: ''Revenue information about persons that paid the nationally statistical rating organization for the issuance or maintenance of a credit rating is available at: [Insert address to Internet Web site].'' The proposed statement is intended to be generic and, thereby, to minimize the burden of including it when a credit rating (or credit ratings) is published. The proposal is designed to simply alert users of credit ratings and others where they can locate the consolidated report containing information about persons who paid the NRSRO to issue or maintain a credit rating. This would allow the users of credit ratings and others accessing the consolidated report to research the persons who had paid the NRSRO for credit ratings outstanding as of the fiscal year end. The researchers could review the amount of net revenue earned by the NRSRO attributable to providing services other than credit ratings to persons who paid for specific credit ratings, the relative standing of the persons who paid for the credit ratings in terms of providing net revenue to the NRSRO, and the credit ratings that the persons paid the NRSRO to issue or maintain.

C. Conclusion

The Commission is proposing these amendments under authority to require an NRSRO to ''make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of

investors, or otherwise in furtherance of the purposes of [the Exchange Act].'' The Commission preliminarily believes these proposed amendments are necessary and appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act for the reasons stated above and because they are designed to provide investors and other users of credit ratings with information to assess the degree of risk that a credit rating may be compromised by the undue influence of the person that paid for the issuance or maintenance of the credit rating.

D. Request for Comment

The Commission generally requests comment on all aspects of this proposed new rule. In addition, the Commission requests comment on the following questions related to the proposal.

- Are the classifications in terms of revenue provided to the NRSRO (top 10%, top 25%, top 50%, bottom 50% or bottom 25%) proposed in new Rule 17g–7 appropriate? How uniform are the potential conflicts of interest with respect to the clients within these categories? Should there be more or less classifications? What should they be? Should the classifications be defined differently, such as on the size of the client, the total revenue, the types of other services provided to the clients?
- How would investors and other users of credit rating ratings use this information?
- Given the potential heterogeneity among clients in a particular tier, how similar is the risk of a potential conflict of interest with regard to clients within a given tier?
- Is being in a top-tier classification likely to create an undue concern that suggests to investors that a rating is conflicted, even if it is not? To the extent a negative connotation exists when an issuer is in a top percentile, what risk, if any, exists that clients will seek out those NRSROs for which their revenue contribution is less significant? Does such behavior risk disproportionately impact smaller NRSROs? If so, how? If not, why not? What other potential behavioral changes might the disclosure induce?
- To what extent is the information in these reports already observable? Can someone look at the information on rated bonds to determine who an NRSRO's biggest clients are? Is there overlap between the biggest clients for rating services and the biggest overall clients of an NRSRO?
- Are there any potential unintended consequences of the proposed disclosures?
- Is 90 days after the end of the fiscal year sufficient time for an NRSRO to generate the information to be used for the next twelve-month period?
- Would more frequent updates of the required information provide more meaningful information to investors? Would the cost of producing more frequently updated reports greatly increase the costs to NRSRO?
- Should a newly-registered NRSRO be exempt from having to generate the consolidated report and make the generic statement until the end of its first fiscal year as a registered NRSRO?
- Would including revenue earned by persons directly or indirectly controlling, controlled by, or under common control with, the NRSRO (*i.e.,* affiliates) provide a more enhanced disclosure of the potential conflicts of undue influence, since the organization as a whole may care about its revenues regardless of which part of the business earned the revenues? If so, would it be useful for investors and other users of credit ratings to have this information? Would it be complicated and costly to do the calculations under proposed Rule 17g–7 if affiliates are included?
- If the term affiliate was added to the proposed disclosures, should the Commission define the term affiliate? For example, if an NRSRO controlled less than 51% of an entity, should the entity be considered an affiliate? If a natural person controlled or owned an NRSRO, should other entities the individual owns or controls be considered affiliates of the NRSRO for purposes of the proposed rule?
- How is the data to be reported currently entered and stored at NRSROs, and would such data be able to be published on an automated or nearly automated basis after a one-time systems adjustment?
- Would it be useful for investors or other users of credit ratings to require an NRSRO to calculate and disclose revenue information with respect to other persons in addition to persons that paid the NRSRO for services? For example, should the Commission attribute underwriter-paid ratings to the issuer? In addition, should the consolidated report provide for double counting of revenues earned by the NRSRO if the Commission attributes payment to both the underwriter and issuer so that users of a credit rating could more easily evaluate whether a large percentage of the NRSRO's revenues are attributable to particular issuers or underwriters or a concentrated group of clients?
- Would it be useful to require another disclosure item in the proposed consolidated report to show the issuer or underwriter who did not pay for the service but was a party to a deal? If so, should there be a particular order of disclosing this item to highlight the frequency of this person's involvement in deals that are rated by a particular NRSRO? For example, should there be a separate disclosure item to reveal the percentage of net revenue earned by the NRSRO in which the party who did not pay for the service was involved in the deal?

Additionally, the Commission is soliciting comment from investors, market participants, and others as to whether it would be appropriate to require that specific information be reported when a credit rating action is made publicly available (*i.e.,* more than a generic statement of where relevant information can be located). Specifically, the Commission solicits comment on the following:

- Should an NRSRO be required to include the information proposed to be included in the consolidated report about a person that paid for the issuance or maintenance of a credit rating along with the publication of the credit rating? If such a requirement were in place, would it be more beneficial to users of NRSROs of credit ratings than the requirements of proposed Rule 17g–7 discussed above? Would such a requirement have higher costs than proposed Rule 17g–7?
- Should an NRSRO be required to disclose the principal procedures and methodologies used in determining the credit rating? Should this disclosure include information about key assumptions used and the qualitative and quantitative models, if any, employed in determining the credit rating? Should the level of disclosure be sufficient so that ''outside parties can understand how a rating was arrived at'' by the NRSRO? What would be the benefits and costs associated with such a requirement?
- If an NRSRO should disclose information about the key assumptions used, should an NRSRO also be required to disclose the degree to which the NRSRO has analyzed how sensitive a rating is to changes in these assumptions? What would be the benefits and costs associated with such a requirement?
- Should an NRSRO be required to disclose if a rating action is being taken as a result of a change to a procedure or methodology, including a change to an applicable qualitative or quantitative model? What would be the benefits and costs associated with such a requirement?
- Should an NRSRO be required to disclose that a rating action is being

taken as a result of an error identified in a procedure or methodology used to generate the credit rating? What would be the benefits and costs associated with such a requirement?

- Should an NRSRO be required to disclose information on the limitations of the credit rating, including information on the reliability, accuracy, and quality of the data relied on in determining the rating? What would be the benefits and costs associated with such a requirement?
- Would a statement on the extent to which key data inputs for the credit rating were reliable or limited, including any limits on the adequacy of historical data and limits on the availability and completeness of other relevant information be beneficial? What would be the benefits and costs associated with such a requirement?
- Should an NRSRO be required to disclose a description of relevant data about the obligor, issuer, security, or money market instrument being rated that was used and relied on for the purpose of determining the credit rating? What would be the benefits and costs associated with such a requirement?
- Should an NRSRO be required to disclose whether material nonpublic information was used in determining the credit rating? Should an NRSRO be required to disclose, in general terms, the type of confidential information used and the impact this information had on its rating action? What would be the benefits and costs associated with such a requirement?
- Is the timeframe for disclosure (the NRSRO's most recent fiscal year end) the best timeframe to evaluate whether a conflict exists and the potential extent of the conflict? For example, should the information disclosed be based on the results over a 3-, 5-, or 10-year period in order to better capture longer term trends?

V. Technical Amendments to Form NRSRO Instructions

The Commission also is proposing to make certain technical amendments to the Instructions to Form NRSRO. The Commission is proposing to amend the title to Exhibit 6 to read ''Information concerning conflicts of interest or potential conflicts of interest relating to the issuance of credit ratings by the credit rating agency,'' rather than the current ''Identification of conflicts of interest relating to the issuance of credit ratings.'' The Commission is proposing this change to the title of Exhibit 6 to Form NRSRO to better reflect the additional disclosures proposed to be required, as described in Section III above. In addition, in the General Instructions [98] to the Form NRSRO Instructions, the Commission is proposing to add ''Division of Trading and Markets'' and ''Mail Stop 7010'' to the mailing address for Form NRSRO. This is designed to facilitate receipt of Form NRSRO by the Division of Trading and Markets.

Further, in the ''Instructions for Annual Certifications,'' the Commission is prosing to clarify that the annual financial reports that an NRSRO must furnish to the Commission pursuant to Section 15E(k) of the Exchange Act and Exchange Act Rules 17g–3(a)(1) through (a)(6), as applicable, should not be furnished as part of the annual certification on Form NRSRO. The Commission also is proposing additional amendments to the instructions to state that pursuant to paragraph (b) of Rule 17g–3, the NRSRO must attach to *each* financial report the certification required by Rule 17g–3.[99]

There has been some confusion among some NRSROs on the requirement to provide a certification for each financial report. The annual certification is a statutory requirement set forth in Section 15E(b)(2) of the Exchange Act.[100] The Commission adopted Rule 17g–1(f) to require that an NRSRO furnish the Commission with its annual certification on Form NRSRO.[101] The annual financial reports that an NRSRO must furnish to the Commission pursuant to Section 15E(k) of the Exchange Act and Exchange Act Rules 17g–3(a)(1) through (a)(6), are separate and distinct requirements from the Form NRSRO requirements. Consequently, the Rule 17g–3 reports should be furnished separately from the Form NRSRO that is used to make the annual certification. Therefore, the Commission is proposing this amendment to clarify the distinct requirements with respect to Form NRSRO and Rule 17g–3(a)(1) through (a)(6).

The Commission also is proposing to correct certain typographical errors in the Form NRSRO. The Commission is proposing to change the phrase ''withdrawal of registration'' to ''withdrawal from registration'' in the first sentence in the ''Instructions for Specific Line Items, Item 5.'' to the Form NRSRO Instructions.[102] In addition, in the instructions to Exhibit 8 to Form NRSRO, the Commission is proposing to delete the phrase ''(See definition below)''. In the instructions to Exhibit 10 to Form NRSRO, the Commission is proposing to change the word ''person'' to ''user of credit rating services'' in the first sentence. Finally, the Commission is proposing to change the paragraph heading for the section titled ''Explanation of Terms'' from ''F.'' to ''I.'' The corrected heading will read: ''I. EXPLANATION OF TERMS''.

The Commission generally requests comment on all aspects of these proposed amendments to Form NRSRO.

VI. Differentiating Structured Finance Credit Ratings

The Commission has adopted requirements that are designed to allow investors and other users of credit ratings to better understand the differences between structured finance products and their credit ratings and other types of debt instruments and their credit ratings. For example, the rules adopted in the *February 2009 Adopting Release* and in today's Companion Release include requirements for specific disclosures about the methodologies and procedures for determining credit ratings for structured finance products and the public disclosure of credit rating performance statistics and histories by class of credit rating. For instance, the *February 2009 Adopting Release* amended Exhibit 1 to Form NRSRO to require disclosure of performance statistics for each class of credit rating for which the NRSRO is registered with the Commission.[103] Moreover, the Commission amended the Exhibit to require that the performance statistics for the class of credit ratings specified in Section 3(a)(62)(B)(iv) of the Rating Agency Act [104] include credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction.[105] This was designed to capture ratings actions for credit ratings of structured finance products that do not meet the narrower statutory definition of ''issuers of asset-backed securities (as that term is defined is section 1101(c) of part 229 of title 17, Code of Federal Regulations).'' [106] The amendment requires that an NRSRO registered in this class of credit ratings must generate and disclose performance statistics for this class, which includes all structured

[98] *See* Paragraph A.8. ''Address'' in the General Instructions to the Form NRSRO Instructions.

[99] *See* 17 CFR 240.17g–3(b).

[100] 15 U.S.C. 78o–7(b)(2).

[101] 17 CFR 240.17g–1(f).

[102] *See* Paragraph H in the ''Instructions for Specific Line Items, Item 5.'' to the Form NRSRO Instructions.

[103] *See February 2009 Adopting Release,* 74 FR at 6457–6459.

[104] 15 U.S.C. 78c(a)(62)(B)(iv).

[105] *See February 2009 Adopting Release,* 74 FR at 6457–6459.

[106] *Id.*

finance products. As a result, these statistics can be compared with performance statistics for other classes of credit ratings for which the NRSRO is registered, such as corporate issuers.

Similarly, the Commission adopted amendments to paragraph (d) of Rule 17g–2, which require that an NRSRO make publicly available, on a six-month delayed basis ratings action information for a random sample of 10% of ratings documented pursuant to paragraph (a)(8) for each class of credit rating for which the NRSRO is registered and has issued 500 or more ratings paid for by the obligor being rated or by the issuer, underwriter, or sponsor of the security being rated (''issuer-paid credit ratings'').[107] This requirement will allow investors and market participants to compare the rating action histories for an NRSRO's issuer-paid structured finance ratings with the histories of other classes of credit ratings where the NRSRO has 500 or more outstanding issuer-paid credit ratings. In the Companion Release being issued today, the Commission is adopting an amendment to Rule 17g–2 to require the disclosure of all outstanding credit ratings initially determined on or after June 26, 2007.[108] This will further enhance the ability of investors and other users of credit ratings to track the relative performance of structured finance credit ratings as compared with performance of other classes of credit ratings.

In the *February 2009 Adopting Release,* the Commission also adopted amendments to Exhibit 2 to Form NRSRO requiring specific disclosures with respect to the procedures and methodologies for determining credit ratings for structured finance products.[109] The amendments require, among other things, that an NRSRO disclose: (1) Whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings; and (2) whether and, if so, how assessments of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction play a part in the determination of credit ratings.

All these measures will assist investors and other users of credit ratings in understanding the different characteristics and risks of structured finance products and the credit ratings for those products. The Commission, however, also continues to explore further ways to increase investor understanding of the differences between structured finance products and other types of debt instruments and the respective credit ratings for those products.

In the sections below, the Commission solicits comments on the following: (1) How the goal of the proposed Rule 17g–7 set forth in the *June 2008 Proposing Release* could be promoted through other measures designed to enhance investor understanding of the differences between the risk characteristics of structured finance products and other classes of debt instruments and the differences between the risk characteristics of credit ratings for structured finance products and credit ratings for other classes of credit ratings; and (2) what measures could be taken to facilitate the ability of NRSROs to determine unsolicited credit ratings for existing debt instruments issued by structured finance products. The goal of either initiative would be to provide the marketplace and investors with information that would allow them to differentiate structured finance credit ratings from credit ratings for other types of debt instruments.

A. The Use of Different Symbols for Structured Finance Products

In the *June 2008 Proposing Release,* the Commission proposed a new rule—Rule 17g–7—that would have required an NRSRO to issue a report with respect to a structured finance credit rating or, alternatively, to use a distinct symbology to identify structured finance credit ratings.[110] Specifically, paragraph (a) of the Rule 17g–7 proposed in 2008 would have required an NRSRO to publish a report accompanying every credit rating it published for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. The NRSRO would have been required to describe in the report the rating methodology used to determine the credit rating and how it differed from a rating for any other type of obligor or debt security, as well as how the risks associated with a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction are different from the risks of other types of rated obligors and debt securities. Paragraph (b), however, would have permitted an NRSRO to comply with the rule by distinguishing its rating symbols for structured finance products. The Commission did not propose requiring that specific rating symbols be used to distinguish credit ratings for structured finance products, instead proposing that an NRSRO would be permitted to choose the appropriate symbol or identifier.[111]

The Commission proposed Rule 17g–7 in the *June 2008 Proposing Release* to address concerns that certain investors assumed the risk characteristics for structured finance products, particularly highly rated instruments, were the same as for other types of similarly rated instruments, as well as concerns that some investors may not have performed adequate internal risk analysis on structured finance products before purchasing them.[112] The goal of the proposal was to spur investors to perform more rigorous internal risk analysis on such products so that they would not overly rely on NRSRO credit ratings in making investment decisions. At the time, the Commission noted that a potential ancillary benefit of the rule would be that it could cause certain investors to seek to better understand the risks of structured finance products that are not necessarily addressed in credit ratings, such as market and liquidity risk.[113]

In the *June 2008 Proposing Release,* the Commission expressed its preliminarily belief that requiring an NRSRO to publish a report along with each publication of a credit rating for a structured finance product likely would provide certain investors with useful information about structured finance products and spur investors to perform more rigorous internal risk analysis on structured finance products.[114] Alternatively, the Commission noted, the use of distinct symbology would alert investors that a structured finance product was being rated and, therefore,

[107] *See February 2009 Adopting Release,* 74 FR at 6460–6463.

[108] *See Companion Release.*

[109] *See February 2009 Adopting Release,* 74 FR at 6459–6460.

[110] As discussed above, the Commission is proposing in this release that a different proposed rule be codified as Rule 17g–7 in the CFR. The Rule 17g–7 being proposed in this Release would require an NRSRO to make publicly available a consolidated report containing information about relative percent of revenues of the NRSRO attributable to persons paying the NRSRO for the issuance or maintenance of a credit rating.

[111] *See June 2008 Proposing Release.*

[112] *See June 2008 Proposing Release,* 73 FR at 36235.

[113] *Id.*

[114] *Id.*

raise the question of how it differs from other types of debt instruments.[115]

The Commission generally requested comment on all aspects of the proposed new rule as well as on several specific questions.[116] A total of 40 commenters responded to this request.[117] Sixteen commenters expressed opposition to the proposed rule as a whole,[118] while six commenters expressed either full or conditional support for both parts of the proposed amendment.[119] Eleven commenters argued in favor of adopting paragraph (a) alone, thereby requiring the publication of a report to accompany structured finance ratings and eliminating the paragraph (b) option of using a distinct symbology.[120] Twenty-nine commenters expressed their opposition to adopting paragraph (b).[121]

Commenters criticized the proposed amendment as burdensome[122] and as providing little, if any, benefit to investors.[123] Several commenters argued that the proposed new requirements would be confusing and, therefore, detrimental to investors.[124] Others expressed concerns that the proposed amendments would stigmatize structured finance products and further weaken the market for these instruments.[125]

The Commission, like a number of commenters, is concerned that the proposal, if adopted, could have limited utility in encouraging investors to perform more rigorous internal risk analysis on such products because NRSROs likely would have opted to use a distinguishing symbology as the less costly alternative. The Commission is concerned about whether the use of a distinct symbol or identifier for structured finance ratings might not achieve the goal of the proposal: Promoting independent analysis and understanding of the distinct risks of structured finance products.

Furthermore, the Commission is concerned that mandating a distinct symbology could create the inaccurate impression that the Commission believes other types of debt instruments

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[115] *Id.*

[116] *See June 2008 Proposing Release,* 73 FR at 36236.

[117] Letter dated June 10, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force (''First SIFMA Symbology Letter''); letter dated June 19, 2008 from Rupert Schoder, Financial Engineer, Socit Gnrale, France (''SGF Symbology Letter''); letter dated July 14, 2008 from Robert Dobilas, President, CEO, Realpoint LLC (''Realpoint Symbology Letter''); letter dated July 21, 2008 from Dottie Cunningham, Chief Executive Officer, Commercial Mortgage Securities Association (''CMSA Symbology Letter''); letter dated July 21, 2008 from Bruce Goldstein, SunTrust Robinson Humphrey (''STRH Symbology Letter''); letter dated July 21, 2008 from Raymond E. Petersen, President, Inland Mortgage Capital Corporation (''Inland Symbology Letter''); letter dated July 21, 2008 from Leonard W. Cotton, Vice Chairman, Centerline Capital Group (''Centerline Symbology Letter''); letter dated July 22, 2008 from Kevin Kohler, VP—Levered Finance, Capmark Investments LP (''Capmark Symbology Letter''); letter dated July 22, 2008 from Mary A. Downing, Director—Surveillance and Due Diligence, Hillenbrand Partners (''Hillenbrand Symbology Letter''); letter dated July 23, 2008 from Kent Wideman, Group Managing Director, Policy & Rating Committee and Mary Keogh, Managing Director, Policy & Regulatory Affairs, DBRS (''DBRS Symbology Letter''); letter dated July 24, 2008 from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. (''JCR Symbology Letter''); letter dated July 24, 2008 from Amy Borrus, Deputy Director, Council of Institutional Investors (''Council Symbology Letter''); letter dated July 24, 2008 from Vickie A. Tillman, Executive Vice President, Standard & Poor's Ratings Services (''S&P Symbology Letter''); letter dated July 24, 2008 from Deborah A. Cunningham and Boyce I. Greer, Co-Chairs Company, Co-Chairs, SIFMA Credit Rating Agency Task Force (''Second SIFMA Symbology Letter''); letter dated July 25, 2008 from Sally Scutt, Managing Director, and Pierre de Lauzun, Chairman, Financial Markets Working Group, International Banking Federation (''IBFED Symbology Letter''); letter dated July 25, 2008 from Denise L. Nappier, Treasurer, State of Connecticut (''Nappier Symbology Letter''); letter dated July 25, 2008 from Suzanne C. Hutchinson, Mortgage Insurance Companies of America (''MICA Symbology Letter''); letter dated July 25, 2008 from Kieran P. Quinn, Chairman, Mortgage Bankers Association (''MBA Symbology Letter''); letter dated July 25, 2008 from Frank Chin, Chairman, Municipal Securities Rulemaking Board (''MSRB Symbology Letter''); letter dated July 25, 2008 from Charles D. Brown, General Counsel, Fitch Ratings (''Fitch Symbology Letter''); letter dated July 25, 2008 from Bill Lockyer, State Treasurer, California (''Lockyer Symbology Letter''); letter dated July 25, 2008 from Jeremy Reifsnyder and Richard Johns, Co-Chairs, American Securitization Forum Credit Rating Agency Task Force (''ASF Symbology Letter''); letter dated July 25, 2008 from Francisco Paez, Metropolitan Life Insurance Company (''MetLife Symbology Letter''); letter dated July 25, 2008 from Cate Long, Multiple-Markets (''Multiple-Markets Symbology Letter''); letter dated July 25, 2008 from Kurt N. Schacht, Executive Director and Linda L. Rittenhouse, Senior Policy Analyst, CFA Institute Centre for Financial Market Integrity (''CFA Institute Symbology Letter''); letter dated July 25, 2008 from Lawrence J. White, Professor of Economics, Stern School of Business, New York University (''White Symbology Letter''); letter dated July 25, 2008 from Jack Davis, Head of Fixed Income Research, Schroder Investment Management North America Inc. (''Schroders Symbology Letter''); letter dated July 25, 2008 from Karrie McMillan, General Counsel, Investment Company Institute (''ICI Symbology Letter''); letter dated July 25, 2008 from Michael Decker, Co-Chief Executive Officer and Mike Nicholas, Co-Chief Executive Officer, Regional Bond Dealers Association (''RBDA Symbology Letter''); letter dated July 25, 2008 from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable (''Roundtable Symbology Letter''); letter dated July 25, 2008 from James H. Gellert, Chairman and CEO and Dr. Patrick J. Caragata, Founder and Executive Vice Chairman, Rapid Ratings International Inc. (''Rapid Ratings Symbology Letter''); letter dated July 25, 2008 from James A. Kaitz, President and CEO, Association for Financial Professionals (''AFP Symbology Letter''); letter dated July 25, 2008 from Gregory W. Smith, General Counsel, Colorado Public Employees' Retirement Association (''Colorado PERA Symbology Letter''); letter dated July 25, 2008 from Keith A. Styrcula, Chairman, Structured Products Association (''SPA Symbology Letter''); letter dated July 28, 2008 from Michel Madelain, Chief Operating Officer, Moody's Investors Service (''Moody's Symbology Letter''); letter dated July 28, 2008 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities and Vicki O. Tucker, Chair, Committee on Securitization and Structured Finance, American Bar Association (''ABA Business Law Committees Symbology Letter''); letter dated July 31, 2008 from Robert S. Khuzami Managing Director and General Counsel, Deutsche Bank Americas (''DBA Symbology Letter''); letter dated August 8, 2008 from Jeffrey A. Perlowitz, Managing Director and Co-Head of Global Securitized Markets, and Myongsu Kong, Director and Counsel, Citigroup Global Markets Inc. (''Citi Symbology Letter''); letter dated August 12, 2008 from John J. Niebuhr, Managing Director, Lehman Brothers, Inc. (''Lehman Symbology Letter''); letter dated August 17, 2008 from Olivier Raingeard, Ph.D (''Raingeard Symbology Letter''); letter dated August 22, 2008 from Robert Dobilas, CEO and President, Realpoint LLC (''Realpoint Symbology Letter'').

[118] *See* Realpoint Symbology Letter; CMSA Symbology Letter; STRH Symbology Letter; Inland Symbology Letter; Centerline Symbology Letter; Capmark Symbology Letter; Hillenbrand Symbology Letter; DBRS Symbology Letter; JCR Symbology Letter; S&P Symbology Letter; Nappier Symbology Letter; MBA Symbology Letter; MetLife Symbology Letter; AFP Symbology Letter; Moody's Symbology Letter; Raingeard Symbology Letter.

[119] *See* MICA Symbology Letter; Lockyer Symbology Letter; CFA Symbology Letter; RDBA Symbology Letter; Colorado PERA Symbology Letter; MSRB Symbology Letter.

[120] *See* Second SIFMA Symbology Letter; IBFED Symbology Letter; ASF Symbology Letter; Schroders Symbology Letter; ICI Symbology Letter; Principal Symbology Letter; Rapid Ratings Symbology Letter; ABA Business Law Committees Symbology Letter; DBA Symbology Letter; Citi Symbology Letter; Lehman Symbology Letter.

[121] *See* First SIFMA Letter; Realpoint Symbology Letter; CMSA Symbology Letter; STRH Symbology Letter; Inland Symbology Letter; Centerline Symbology Letter; Capmark Symbology Letter; Hillenbrand Symbology Letter; DBRS Symbology Letter; JCR Symbology Letter; S&P Symbology Letter; Second SIFMA Symbology Letter; IBFED Symbology Letter; Nappier Symbology Letter; MBA Symbology Letter; ASF Symbology Letter; Fitch Symbology Letter; MetLife Symbology Letter; Rapid Ratings Symbology Letter; Roundtable Symbology Letter; Schroders Symbology Letter; ICI Symbology Letter; Principal Symbology Letter; AFP Symbology Letter; Moody's Symbology Letter; Raingeard Symbology Letter; ABA Business Law Committees Symbology Letter; DBA Symbology Letter; Citi Symbology Letter; Lehman Symbology Letter.

[122] *See* JCR Symbology Letter; S&P Symbology Letter; Moody's Symbology Letter; Roundtable Symbology Letter.

[123] *See* Realpoint Symbology Letter; Schroders Symbology Letter; Raingeard Symbology Letter; MICA Symbology Letter; Roundtable Symbology Letter.

[124] *See* CMSA Symbology Letter; STRH Symbology Letter; Inland Symbology Letter; Centerline Symbology Letter; Capmark Symbology Letter; Hillenbrand Symbology Letter; DBRS Symbology Letter; JCR Symbology Letter; ICI Symbology Letter; Principal Symbology Letter; MetLife Symbology Letter; Rapid Ratings Symbology Letter;

[125] *See* First SIFMA Symbology Letter; Realpoint Symbology Letter; Principal Symbology Letter; MBA Symbology Letter; Lockyer Symbology Letter; ASF Symbology Letter; MetLife Symbology Letter; ABA Business Law Committees Symbology Letter; DBA Symbology Letter; Lehman Symbology Letter.

are less risky. The Commission believes a more effective way to differentiate credit ratings for structured finance products may be by enhancing investor understanding of the distinct risk characteristics of these debt instruments and their credit ratings. For these reasons, at this time the Commission is deferring consideration of action on the proposal to issue a report or use a distinct symbology at this time. Instead, the Commission wants to study further whether there are other ways to better achieve the goals of the proposal: greater investor awareness of the unique risks of structured finance products and credit ratings for structured finance products.

The Commission believes that some differences in the risk characteristics seem readily apparent and are fairly well understood by investors. For example, the Commission believes that an investor would understand that the continued payment of principal and interest to the holder of a structured finance debt instrument typically depends on the performance of a pool of underlying financial assets such as mortgages, business and student loans, or credit card receivables; whereas the performance of a corporate bond typically depends on the issuer's ability to generate income from business operations, and the performance of a municipal bond typically depends on the issuer's ability to collect taxes or earn revenues from services provided by a specific utility such as a sewer or water company.

However, even high-level generalizations about the differences between classes of debt instruments may not always hold true. Some structured finance issuers actively manage the composition of the pool of underlying financial assets (in contrast to a static pool) and, as a result, these products are more risk-sensitive to the discretion of the manager. For example, the performance of the structured finance issuer will depend on the judgment of the manager of the pool of underlying assets. This is similar to how the performance of corporate issuers is sensitive to the judgment of senior management and their boards. Moreover, some corporate issuers—particularly in the financial sector—are highly risk-sensitive to the performance of financial assets similar to structured finance issuers that hold or reference the same types of assets. In short, generalizations about differences that are not carefully crafted run the risk of creating more confusion or misunderstanding than clarity for investors.

For these reasons, the Commission is asking a series of questions below designed to elicit further views from market participants and others on how the risk characteristics of structured finance products and credit ratings differ from the risk characteristics of corporate, municipality, and sovereign nation debt instruments and their credit ratings.[126] Specifically, the Commission requests market participants and others to provide their views in the following four areas: (1) The differences between structured finance products and other debt instruments; (2) the differences between credit ratings for structured finance products and credit ratings for other types of debt instruments; (3) potential measures to communicate differences in structured finance products to investors; and (4) potential measures to communicate differences in structured finance credit ratings to investors.[127]

Persons making submissions are asked to provide detailed explanations of their views and analyses and cite relevant studies.

Differences Between Structured Finance Products and Other Debt Instruments

- What do market participants and others believe are the significant differences in the risk characteristics of structured finance debt instruments as compared with debt instruments issued by corporate issuers, municipalities, and sovereign nations in terms of credit risk, market risk, interest rate risk, and liquidity risk? What do market participants and others believe are the main drivers of the differences in risk characteristics?
- How do market participants and others believe the trading markets for structured finance products compare with the trading markets for debt instruments of corporate issuers, municipalities, and sovereign nations in terms of transparency and providing liquidity to investors? Do market participants and others believe differences in the trading markets for these debt instruments create differing levels of credit risk, market risk, interest rate risk, or liquidity risk for structured finance products as compared with debt instruments issued by corporate issuers companies, municipalities, and sovereign nations?
- How do market participants and others assess the relative use of leverage by structured finance issuers as compared with corporate issuers, municipalities, and sovereign nations? Do differences in the use of leverage create differing levels of credit risk, market risk, interest rate risk, or liquidity risk for structured finance products as compared with debt instruments issued by corporate issuers, municipalities, and sovereign nations? Does leverage act as a driver of differing levels of risk for structured finance products and account for the fact that certain corporate issuers also employ leverage?
- How do market participants and others assess the relative complexity of structured finance issuers as compared with corporate issuers, municipalities, and sovereign nations in terms of capital structure and operations? For example, in assessing complexity, how do market participants and others account for the fact that a structured finance product can be comprised of a static pool of cash flow assets whereas a corporate issuer may have an array of business lines operated through hundreds of affiliates located around the globe? Do differences in complexity create differing levels of credit risk, market risk, interest rate risk, and liquidity risk for structured finance products as compared with debt instruments issued by corporate issuers, municipalities, and sovereign nations?
- How do market participants and others assess the relative sensitivity of structured finance issuers to macroeconomic factors as compared with corporate issuers, municipalities, and sovereign nations? For example, do structured finance products have greater or lesser risk sensitivity to a macroeconomic stress event such as a recession than debt instruments issued by corporate issuers, municipalities, and sovereign nations?
- How do market participants and others assess the relative risks of a sector of structured finance issuers such as issuers that rely on the performance of a particular type of financial asset (*e.g.,* residential mortgages or credit card receivables) as compared with an industry of corporate debt issuers (*e.g.,* financial services, automakers, technology companies, or healthcare providers) or geographically concentrated municipal issuers (*e.g.,* within a State) or sovereign debt issuers (*e.g.,* within a region of the globe)? For example, does a structured finance

[126] For the purposes of this request for comment, the Commission intends the term ''corporate issuer'' to include any issuer that is not a structured finance issuer or a government issuer.

[127] For views on some of these issues see, for example, *The Role of Credit Rating Agencies in the Structured Finance Markets,* May 2008, Technical Committee of the International Organization of Securities Commissioners; *The Role of Ratings in Structured Finance: Issues and Implications,* (CGFS 2005), January 2005, Committee on the Global Financial System, Bank of International Settlements; *The Role of Credit Rating Agencies in Structured Finance, Consultation Paper,* February 2008, The Committee of European Securities Regulators.

sector have greater or lesser risk sensitivity to a macroeconomic stress event such as a recession than corporate debt issuers within a specific industry or geographically concentrated municipal or sovereign issuers?

• How do market participants and others perceive the degree of idiosyncratic risk inherent in structured finance products relative to debt instruments issued by corporate issuers, municipalities, and sovereign nations? Do market participants and others believe the different ways these debt issuers generate income to meet principal and interest payments to debt holders (*e.g.,* through underlying income generating assets for structured finance products, revenues generated through business operations for corporate issuers, and taxing authority or utility revenues for municipal and sovereign issuers) create differing levels of idiosyncratic risk?

• In assessing the relative level of idiosyncratic risk inherent in structured finance issuers as compared with debt instruments issued by corporate issuers, municipalities, and sovereign nations, what do market participants and others believe is the impact of the fact that different structured finance issuers can hold the same types of underlying cash flow generating assets (*e.g.,* residential mortgages) and have very similar legal structures? What is the impact of the fact that corporate issuers can operate using different business models and have differing levels of management competence?

• Do market participants and others believe there are material differences between structured finance products and debt instruments issued by corporate issuers, municipalities, and sovereign nations in terms of recovery after default? Do market participants and others believe debt holders are likely to recover more or less principal after a structured finance debt instrument default than after the default of a debt instrument issued by a corporate issuer, municipality, or sovereign nation?

• Do market participants and others believe there are important differences in the level of moral hazard present in structured finance products relative to debt instruments issued by corporate issuers, municipalities and sovereign nations? Could the fact that structured finance products consist of asset pools which are ultimately purchased from originators of such assets result in lower quality assets for structured finance products as compared with the assets of corporate issuers, municipalities and sovereign nations?

• To the extent that market participants and others identify differences between the risk characteristics of structured finance products and other debt instruments, do they believe the differences identified apply across all types of structured finance products or just to certain categories of products? Are generalizations about the different risk characteristics of structured finance products as compared to other debt instruments appropriate or is it more appropriate to categorize structured finance products by underlying asset type (*e.g.,* residential mortgage, commercial mortgage, student loan, credit card receivable, lease) or structure type (*e.g.,* asset-backed security, collateralized debt obligation (CDO), CDO-squared or cubed, synthetic or hybrid CDO, constant proportion debt obligation, asset-backed commercial paper conduit)?

Differences Between Credit Ratings for Structured Finance Products and Credit Ratings for Other Types of Debt Instruments

• What are the significant differences in the risk characteristics of credit ratings for structured finance products as compared with credit ratings for debt instruments issued by corporate issuers, municipalities, and sovereign nations in terms of ratings accuracy and performance?

• Are structured finance debt instruments inherently more difficult to rate accurately than debt instruments issued by corporate issuers, municipalities, and sovereign nations? If so, what do market participants and others believe are the factors that make structured finance products more difficult to rate?

• Does the fact that the creditworthiness of a structured finance issuer typically depends on the performance of a pool of financial assets make these debt instruments more difficult to rate accurately than debt instruments issued by corporate issuers, municipalities, and sovereign nations?

• Do market participants and others believe that the reliance on quantitative analysis (*e.g.,* statistical models and historical data) to determine credit ratings for structured finance products as compared with a greater reliance on qualitative analysis to determine credit ratings for debt instruments issued by corporate issuers, municipalities, and sovereign nations increases or decreases the accuracy risk for structured finance credit ratings?

• Do market participants and others believe that the information available about structured finance issuers used to determine credit ratings as compared to the information available to be used to determine credit ratings about corporate issuers, municipalities, and sovereign nations makes it more difficult to determine accurate credit ratings for structured finance debt instruments and/or to conduct surveillance on outstanding structured finance credit ratings? If so, do market participants and others believe it is easier to determine accurate credit ratings, and monitor those ratings, for corporate issuers that are required to file periodic public reports and financial statements and provide access to management? Is the information used to determine and monitor credit ratings of corporate issuers, municipalities, or sovereign nations more forward looking (*e.g.,* based on more on forecasts)? In addition, do market participants and others believe that the historical data used to determine and monitor structured finance credit ratings of shorter duration or otherwise less robust than the historical data used to determine and monitor credit ratings for corporate issuers, municipalities, or sovereign nations?

• Do market participants and others believe it is more difficult for investors and market observers to perform independent analysis of structured finance products than of securities issued by corporate issuers, municipalities, and sovereign nations? If so, does this impact the accuracy of structured finance credit ratings as compared to credit ratings for corporate issuers, municipalities, and sovereign nations?

• Do market participants and others believe the conflict of being paid to determine credit ratings is more attenuated in the structured finance sector than in the corporate, municipal, and sovereign sectors? If so, why? Does this impact the accuracy of structured finance credit ratings?

• Do market participants and others believe structured finance credit ratings are more likely to have a greater number of ratings transitions (*i.e.,* upgrades or downgrades) than credit ratings for debt instruments issued by corporate issuers, municipalities, or sovereign nations? If so, what are the factors that create this effect?

• Are structured finance credit ratings more likely to experience transitions of greater magnitude (*i.e.,* upgrades or downgrades that span a larger number of credit rating categories (notches)) than credit ratings for debt instruments issued by corporate issuers, municipalities, or sovereign nations? If so, what are the factors that make structured finance credit ratings more

prone to transitions of greater magnitude in credit rating category?

• Do market participants and others believe issuers, arrangers, sponsors, and managers of structured finance products are able to ''game'' rating agency methodologies resulting in credit ratings that are less accurate than ratings for other debt instruments? Do they believe the ability of issuers, arrangers, sponsors and managers to adjust the characteristics of structured finance products, including the number and relative size of tranches and the composition of the asset pool in order to achieve particular credit ratings, result in ratings that are less accurate than ratings for debt instruments issued by corporate issuers, municipalities and sovereign nations?

• To the extent that market participants and others identify differences between the risk characteristics of structured finance credit ratings and credit ratings for other debt instruments, do differences identified apply globally to all structured finance products or just to certain categories of products? Do market participants and others believe generalizations about the different risk characteristics of credit ratings for structured finance products as compared to credit ratings for other debt instruments can be made? Is it more appropriate to categorize structured finance credit ratings by underlying asset type (*e.g.,* residential mortgage, commercial mortgage, student loan, credit card receivable, lease) or structure type (*e.g.,* asset-backed security, collateralized debt obligation (CDO), CDO-squared or cubed, synthetic or hybrid CDO, constant proportion debt obligation, asset-backed commercial paper conduit)?

Measures To Communicate Differences in Structured Finance Products to Investors

• To the extent that market participants and others identified significant differences in the risk characteristics of structured finance debt instruments as compared with debt instruments issued by corporate issuers, municipalities, and sovereign nations in terms of credit risk, market risk, interest rate risk, and liquidity risk, what are their views on whether steps should be taken to better communicate these differences to investors in a manner reasonably designed to enhance investor understanding of the differences?

• Do market participants and others believe structured finance issuers should be required to disclose these general differences in the types of securities? If so, how should the disclosures be made? For example, should they be stated in offering documents and periodic reports or are there other mechanisms that could be used to convey the differences in the types of securities?

• Do market participants and others believe NRSROs should be required to disclose these differences? If so, how should the disclosures be made? For example, should the disclosures be included in a report issued at the same time a rating action is taken with respect to a structured finance product, in Form NRSRO, or through some other mechanism?

• Do market participants and others believe the disclosure documents should required to be delivered to prospective investors in investment pools that may hold structured finance products be required to include these disclosures? If so, how should these disclosures be made?

Measures To Communicate Differences in Structured Finance Credit Ratings to Investors

• To the extent that market participants and others identified material differences in the risk characteristics of credit ratings for structured finance debt instruments as compared with credit ratings for debt instruments issued by corporate issuers, municipalities, and sovereign nations in terms of ratings accuracy and performance, what are their views on measures that can be taken to communicate these differences to investors in a manner reasonably designed to enhance investor understanding of the differences?

• Do market participants and others believe structured finance issuers should be required to disclose these differences? If so, how should the disclosures be made? Should they be stated in offering documents and periodic reports, or are there other mechanisms that could be used to convey the disclosures?

• Do market participants and others believe NRSROs should be required to disclose these differences? For example, it has been suggested that NRSRO disclose the following types of information about structured finance products: [128]

1. The diligence that is performed by or provided to the NRSRO about the underlying assets, and quality control of numerical data provided to the NRSRO;

2. The characteristics and sensitivities of models used or relied upon by the NRSRO in assessing the likely performance of the structured finance product or the underlying assets;

3. The extent to which the NRSRO relies on representations and warranties made by transaction participants;

4. The assumptions as to future events and economic conditions that are embedded in the analytical models used by the NRSRO in arriving at a given rating;

5. Publishing ''what if'' scenario analyses that address the ratings implications of changes in the underlying assumptions upon which ratings are based and provide insight into ratings tolerance to changing economic or risk circumstances;

6. Providing additional information relating to default probability, loss sensitivity, severity of loss given default, short-tail and long-tail risk and similar risk metrics associated with each class of credit ratings.

• If you believe these types of disclosures and other disclosures should be made by NRSROs, how should the disclosures be made? Should the disclosures be stated in a report issued at the same time a rating action is taken with respect to a structured finance product, in Form NRSRO, or through some other mechanism?

• Do market participants and others believe the disclosure documents required to be delivered to prospective investors in investment pools that may hold structured finance products should be required to include the disclosures? If so, how should the disclosures be made?

B. Credit Ratings for Existing Structured Finance Debt Instruments

Another way to differentiate credit ratings for structured finance products from other types of debt instrument ratings is to increase the opportunity for independent analysis of the credit worthiness of the products. To this end, in the companion release, the Commission is adopting amendments to Rule 17g–5 that require NRSROs that are paid by arrangers to determine credit ratings for structured finance products to provide other NRSROs access to a password-protected Internet Web site that lists each deal they have been hired to rate. A hired NRSRO also would be required to obtain representations from the arranger hiring the NRSRO that the arranger will maintain a password-protected Internet Web site that contains all the information the arranger provides to the hired NRSRO to determine and monitor the credit rating and that it will make this information available to

[128] *See e.g.,* June 25, 2008 Letter from Jeff Riefsnyder and Richard Johns on behalf of the American Securitization Forum to the US Securities and Exchange Commission regarding ''Exchange Act Release No. 34–57967 (File No. S7–13–08)''.

NRSROs not hired to determine and monitor the rating. As discussed in detail in the Commission's Companion Release, these requirements are designed to create a mechanism by which non-hired NRSROs will be able to access the NRSRO Internet Web sites to learn of new deals being rated and then access the arranger Internet Web sites to obtain the information provided by the arranger to the hired NRSRO during the entire initial rating process and, thereafter, for the purpose of surveillance.[129] The hired NRSRO need only provide access to its password-protected Internet Web site to a non-hired NRSRO whose certification provided to the Commission indicates that it has either (1) determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to Rule 17g–5(a)(3) as amended in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or (2) has not accessed information pursuant to Rule 17g–5(a)(3) as amended 10 or more times in the calendar year prior to the year covered by the certification. NRSROs also will be required to disclose in their certifications the number of deals for which they obtained information through accessing the Internet Web sites and the number of ratings they issued using that information during the most recent calendar year during which it obtained information through accessing these Internet Web sites certification or that they previously had not accessed such information 10 or more times in a calendar year.

These amendments to Rule 17g–5 described above are designed to allow NRSROs not hired to rate a structured finance deal to get sufficient information to determine a credit rating for the debt instruments to be issued. Generally, the information relied on by the hired NRSROs to rate new debt issuances of structured finance issuers is non-public. This makes it difficult for other NRSROs to rate these securities and money market instruments. As a result, the products frequently are issued with ratings from only one or two NRSROs and only by NRSROs that are hired by the issuer, sponsor, or underwriter (*i.e.,* NRSROs that may be subject to the conflict of being repeatedly paid by certain arrangers to rate these securities and money market instruments).

The rule amendments also are designed to require the disclosure of the necessary information to any NRSRO—whether hired or not—to permit non-hired NRSROs to determine credit ratings for the debt instruments to be issued. The Commission believes that absent this requirement a non-hired NRSRO would have a much more difficult time obtaining the information necessary to issue an unsolicited credit rating at the time the debt instruments were issued into the market. Without the rule amendment, in most cases, the non-hired NRSRO's prospects for determining a pre-issuance credit rating would depend on the issuer's willingness to provide the information to the NRSRO notwithstanding the fact that the issuer was paying other NRSROs to rate the to-be-issued debt instruments.

The goal is to increase the number of credit ratings extant for a given structured finance security or money market instrument and, in particular, promote the issuance of credit ratings by NRSROs that are not hired by the arranger. This is designed to provide users of credit ratings with a broader range of views on the creditworthiness of the security or money market instrument. In addition, the rule amendments are designed to make it more difficult for arrangers to exert influence over the NRSROs they hire to determine credit ratings for structured finance products. By opening up the rating process to more NRSROs, the rule amendments make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the credit ratings issued by other NRSROs.

As the Commission noted in the *February 2009 Proposing Release,* the text of paragraph (a)(3)(i) refers to transactions where the NRSRO is in the process of determining an ''initial'' credit rating.[130] The rule does not require the NRSRO to include on the Internet Web site information about securities or money market instruments once the NRSRO has published the initial rating and is monitoring the rating. The amendment is designed to alert other NRSROs about new deals and direct them to the Internet Web site of the arranger where information to determine initial ratings and monitor the ratings can be accessed. Consequently, upon publication of the initial rating, the NRSRO can remove the information about the security or money market instrument from the list it maintains on the Internet Web site. Similarly, if the arranger decides to terminate the rating process before a hired NRSRO publishes an initial rating, the NRSRO would be permitted to remove the information from the list.[131]

The Commission is aware that there are conflicting characterizations about the ability of market participants and others, including NRSROs not hired to rate the deal, to obtain information necessary to determine and monitor a credit rating for structured finance debt instrument after issuance. The Commission understands that some of the trustees and servicers involved with the structured finance issuer provide monthly reports that allow NRSROs not hired to rate the issuer's debt instruments to determine and monitor credit ratings for those securities and money market instruments. The Commission also understands that some third-party venders aggregate the information provided by the trustees and servicers in a manner that permits independent credit analysis by NRSROs and investors. The Commission understands that some market participants argue that the trustees and servicers restrict access to the information to investors and hired NRSROs and that the third-party venders do not provide sufficient information.

The Commission believes it would be helpful to solicit comments from market participants and others as to whether measures should be taken by the Commission to enhance the ability of non-hired NRSROs to determine credit ratings for structured finance debt instruments that were issued before the compliance date of the amendments to Rule 17g–5 being adopted in the *Companion Release.*

For these reasons, the Commission is asking a series of questions below designed to elicit comments from market participants and others about whether currently there is sufficient information (or access to such information) to permit an NRSRO to determine unsolicited credit ratings for structured finance debt instruments issued prior to the compliance date of the amendments to Rule 17g–5 being adopted today.

Persons making submissions are asked to provide detailed explanations and analyses and cite relevant studies.

- Do market participants and others believe the ability of NRSROs to access information about structured finance debt instruments issued before the compliance date for the Rule 17a–5

[129] *See Companion Release.*

[130] *See February 2009 Proposing Release,* 74 FR at 6493.

[131] *See Companion Release.*

amendments (''compliance date'') is restricted in such a manner as to preclude or seriously discourage NRSROs from determining credit ratings if they have not been hired by the arranger? Do the issuers, trustees and servicers that control access to this information preclude a non-hired NRSRO from accessing the information or impose barriers that discourage a non-hired NRSRO from accessing it?

• Do market participants and others believe the information disclosed by structured finance issuers, trustees, and servicers or by third-party venders is insufficient to determine unsolicited credit ratings for structured finance debt instruments issued before the compliance date?

• What specific measures, if any, should be taken to secure the disclosure of information by issuers, trustees or servicers of structured finance products issued before the compliance date or the NRSROs that were hired to rate those structured finance products to enable NRSROs that were not hired to determine and monitor a credit rating where the debt instrument was issued prior the compliance date?

• Do market participants and others believe if the information provided to the hired NRSRO to determine and monitor a credit rating for a structured finance product issued before the compliance date was made available to another NRSRO, the non-hired NRSRO would be able to determine a meaningful unsolicited credit using that information alone?

VII. General Request for Comment

The Commission invites interested persons to submit written comments on any aspect of the proposed amendments, in addition to the specific requests for comments. Further, the Commission invites comment on other matters that might have an effect on the proposal contained in the release, including any competitive impact.

VIII. Paperwork Reduction Act

Certain provisions of the proposed amendments to Rule 17g–3 and the Instructions to Exhibit 6 to Form NRSRO, as well as the new proposed Rule 17g–7 contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA''). The Commission is submitting the proposed amendments and the proposed new collection to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

(1) Rule 17g–3, Annual reports to be furnished by nationally recognized statistical rating organizations (OMB Control Number 3235–0626);

(2) Rule 17g–1, Application for registration as a nationally recognized statistical rating organization; Form NRSRO and the Instructions for Form NRSRO (OMB Control Number 3235–0625); and

(3) Rule 17g–7, Reports to be made public by nationally recognized statistical rating organizations about persons that paid the nationally recognized statistical rating organization for the issuance or maintenance of a credit rating (a proposed new collection of information).

A. Collections of Information Under the Proposed Rule Amendments

The Commission is proposing for comment rule amendments to prescribe additional requirements for NRSROs. The proposed amendments to Rule 17g–3 would require an NRSRO to submit an additional annual report to the Commission. The proposed amendments to Rule 17g–3 would require an NRSRO to furnish a new unaudited report describing the steps taken by the NRSRO's designated compliance officer during the fiscal year to administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act (prevention of misuse of material nonpublic information and management of conflicts of interest), and to ensure compliance with the securities laws and rules and regulations thereunder.[132] The proposed amendment to Rule 17g–3 also would require that the report include a description of any compliance reviews of the activities of the NRSRO; the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such matter; a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO; and a description of the persons within the NRSRO who were advised of the results of the reviews.[133]

In addition, proposed amendments to the Instructions to Exhibit 6 to Form NRSRO would require an applicant/NRSRO to furnish the Commission with information regarding the revenues an NRSRO receives from major clients and from services other than determining credit ratings. Finally, proposed Rule 17g–7 would require an NRSRO, on an annual basis, to make publicly available on its Internet Web site a consolidated report that shows certain information with respect to each person that paid the NRSRO to issue or maintain a credit rating. First, the NRSRO must include the percent of the net revenue attributable to the person earned by the NRSRO for that fiscal year for providing services and products other than credit rating services. Second, the NRSRO must include the relative standing of the person in terms of the person's contribution to the net revenue of the NRSRO for the fiscal year. Third, the NRSRO must include all outstanding credit ratings paid for by the person.[134]

B. Proposed Use of Information

The collections of information in the proposed amendments to Rule 17g–3 to add an additional unaudited report to describe the steps taken by the designated compliance officer during the fiscal year to administer certain policies and procedures and to ensure compliance with securities laws and rules and regulations would improve the integrity of the ratings process by establishing a discipline under which the NRSRO's designated compliance officer would need to report to the Commission the steps taken by the compliance officer to fulfill the officer's statutory responsibilities. The act of reporting these steps is designed to promote the active engagement of the designated compliance officer in reviewing an NRSRO's compliance with internal policies and procedures. The proposed report also could strengthen the Commission's oversight of NRSROs by highlighting possible problem areas in an NRSRO's rating processes and providing an additional tool for the Commission to monitor how the NRSRO's designated compliance officer is fulfilling the responsibilities prescribed in Section 15E(j) of the Exchange Act. In addition, with respect to the proposed amendments to Rule 17g–3, the identification of the persons within the NRSRO advised of the results of the review could also promote the appropriate escalation of compliance issues to the management of the NRSRO.

Further, the collections of information in the proposed amendments to Exhibit 6 to the Instructions to Form NRSRO would allow users of credit ratings to more effectively evaluate the integrity of the NRSRO's credit ratings themselves

[132] *See* proposed Rule 17g–3(a)(7).

[133] *See* proposed Rule 17g–3(a)(7)(ii). The proposed report also would be certified by the designated compliance officer. *See* proposed Rule 17g–3(b)(2).

[134] *See* proposed Rule 17g–7.

and whether they believe the NRSRO is effectively managing its conflicts of interests otherwise identified in Exhibit 6. The collection of information in proposed new Rule 17g–7 would provide users of credit ratings with information about the potential conflicts of interest that arise when an NRSRO is paid to determine a credit rating for a specific obligor, security, or money market instrument.

Finally, the collections of information in the proposed amendments also are designed to further assist the Commission in effectively monitoring, through its examination function, whether an NRSRO is conducting its activities in accordance with Section 15E of the Exchange Act [135] and the rules thereunder.

C. Respondents

In adopting the original rules under the Rating Agency Act, as well as additional rules in February 2009, the Commission estimated that approximately 30 credit rating agencies would be registered as NRSROs.[136] The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the amendments and the proposed new rule. Since the original rules under the Rating Agency Act became effective in June 2007, ten credit rating agencies have registered with the Commission as NRSROs.[137] The rules regarding the registration have been in effect for just over two years; consequently, the Commission expects additional entities will register.

The Commission generally requests comment on all aspects of these estimates for the number of respondents. In addition, the Commission requests specific comment on the following items related to these estimates.

- For purposes of the PRA should the Commission continue to use the estimate that 30 credit rating agencies will register as NRSROs?
- Alternatively, should the Commission raise or lower that number, given that ten credit rating agencies have registered with the Commission as NRSROs in the two years that the NRSRO registration program has been in effect? If so, what should the number be? Commenters should explain how they arrived at the estimate and identify any sources of industry information used in arriving at the estimate.

Commenters should provide specific data and analysis to support any comments they submit with respect to these estimates with respect to the number of respondents.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the proposed rule amendments and proposed new rule would be approximately 2,760 hours [138] on an annual basis and 4,650 hours [139] on a one-time basis.

The total annual and one-time hour burden estimates described below are averages across all types of NRSROs expected to be affected by the proposed rule amendments. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. Consequently, the burden hour estimates represent the average time across all NRSROs. The Commission further notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Proposed Amendments to Rule 17g–3

Rule 17g–3 requires an NRSRO to furnish certain reports to the Commission on an annual basis, including audited financial statements, as well as other annual reports.[140] The Commission is proposing to amend Rule 17g–3 to require an NRSRO to furnish the Commission with an additional unaudited report containing a description of the steps taken by the designated compliance officer during the fiscal year to administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act (management of conflicts of interest and prevention of the misuse of material nonpublic information); and ensure compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act.[141]

Proposed new paragraph (a)(7)(ii) of Rule 17g–3 also would provide that the report must include: (1) A description of any compliance reviews of the activities of the NRSRO; (2) the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such matter; (3) a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO; and (4) a description of the persons within the NRSRO who were advised of the results of the reviews.

The total annual burden currently approved by OMB for Rule 17g–3 is 7,000 hours.[142] The current annual hour burden estimate to prepare and file the annual reports under Rule 17g–3 is 200 hours per respondent, including the audited financial statements under Rule 17g–3(a)(1).[143] With respect to the proposed amendment, the Commission estimates, based on staff experience, that the amount of time it would take to prepare a report describing the steps taken by the designated compliance officer during the fiscal year to administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act (management of conflicts of interest and prevention of the misuse of material nonpublic information); and to ensure compliance with the securities laws and rules and regulations thereunder, would be approximately 30 hours per year for a total annual hour burden of 900 hours.[144]

The Commission based this estimate, in part, on the fact that the areas covered by the proposed amendment to Rule 17g–3 overlap with the duties already required of the NRSRO's designated compliance officer pursuant to Section 15E(j) of the Exchange Act. The Commission preliminarily believes that the estimated hour burden under the proposed amendment to Rule 17a–3 would include the time it would take to compile information to draft the report and the preparation and filing of the report itself. In addition, this one-time hour burden estimate also includes the time it would take to identify and describe material compliance matters,

[135] 15 U.S.C. 78o–7.

[136] *See June 2007 Adopting Release,* 72 FR at 33607.

[137] A.M. Best Company, Inc.; DBRS Ltd.; Fitch; Japan Credit Rating Agency, Ltd.; Moody's; Rating and Investment Information, Inc.; S&P; LACE Financial Corp.; Egan-Jones Rating Company; and Realpoint LLC.

[138] 900 + 60 + 1,800 = 2,760.

[139] 750 + 3,900 = 4,650.

[140] 17 CFR 240.17g–3.

[141] *See* proposed Rule 17g–3(a)(7)(ii).

[142] *See February 2009 Adopting Release,* 74 FR at 6473.

[143] *See February 2009 Adopting Release,* 74 FR at 6472. The Commission based this proposed estimate, in part, on the average number of annual hours (200 hours) divided by the number of annual reports required to be prepared under current Rule 17g–3(a)(1)–(6): 200 annual hours/6 reports = 33.33 hours (rounded to 30 hours).

[144] 30 hours × 30 NRSROs = 900 hours.

any remediation and the persons advised of the results of the reviews. Consequently, the Commission also based this estimate, in part, on the average estimated number of hours it would currently take an NRSRO to complete one annual report under current Rule 17g–3 (*i.e.,* approximately 30 hours).[145]

Given the potentially sensitive nature of the proposed report, the Commission also preliminarily believes that an NRSRO would likely engage outside counsel to assist it in the process of drafting and reviewing the proposed report under Rule 17g–3. The Commission estimates that the time an outside attorney would spend on this work would depend on the size and complexity of the NRSRO. The Commission estimates that, on average, an outside counsel would spend approximately 20 hours assisting an NRSRO and its designated compliance officer in drafting and reviewing the proposed report on a one-time basis for an aggregate burden to the industry of 600 hours.[146] Based on industry sources, the Commission estimates that the cost of an outside counsel would be approximately $400 per hour. For these reasons, the Commission estimates that the average one-time cost to an NRSRO would be approximately $8,000[147] and the one-time cost to the industry would be approximately $240,000.[148]

The Commission generally requests comment on all aspects of the burden estimates for the proposed amendments to Rule 17g–3. Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates. In addition, the Commission requests specific comment on the following items related to these estimates.

- To what extent would NRSROs rely on outside counsel with respect to the preparation, drafting and review of the proposed report?

2. Amendments to Form NRSRO

The Commission is proposing to amend the Instructions to Exhibit 6 to Form NRSRO to require an applicant/NRSRO to furnish the Commission with information regarding the revenues an NRSRO receives from major clients and from services other than determining credit ratings.

As stated above, the Commission proposes amending the instructions for Exhibit 6 to augment the information about conflicts of interest disclosed in Form NRSRO. The Commission prescribed the information currently required in Exhibit 6 to implement Section 15E(a)(1)(B)(vi) of the Exchange Act, which requires that an application for registration contain information regarding any conflict of interest relating to the issuance of credit ratings by the applicant/NRSRO.[149] The proposed amendments to Form NRSRO would change the instructions for the Form to require that NRSROs provide specific disclosure of certain percentages of its revenue related to its large customers and services it provides, other than the issuance of credit ratings, in Exhibit 6 to the Form. The Commission preliminarily believes that an NRSRO would generate the financial information and complete the proposed new additional disclosures required by Exhibit 6 to Form NRSRO using internal records and current NRSRO personnel.

The total annual burden currently approved by OMB for Rule 17g–1 and Form NRSRO is 6,400 hours.[150] Based on staff experience, the Commission estimates that the average time necessary for an applicant or NRSRO to gather the information for the first time in order to complete the additional disclosures that would be required by the proposed amendments to Exhibit 6 to Form NRSRO would be 25 hours per NRSRO, which would be a one-time hour burden to the industry of 750 hours.[151] The Commission preliminarily believes, based on staff experience, that the average time it would take an NRSRO to complete the additional disclosures that would be required by the proposed amendments would be comparable to the current estimate of 25 hours that it would take an NRSRO to complete an amendment to a Form NRSRO.[152] The Commission preliminarily believes that these burden estimates would be comparable because, based on the staff's experience with Form NRSRO filings furnished to the Commission over the past two years, the Commission believes that time and amount of information involved in filing an amendment to part of the Form NRSRO would be similar to the time involved to update the Form NRSRO with the proposed information to Exhibit 6 to Form NRSRO.

In addition, the proposed amendments to the Instructions to Exhibit 6 would provide that after registration, an NRSRO with a fiscal year end of December 31 must update the proposed additional disclosures in Exhibit 6 information as part of its annual certification. Rule 17g–1(f) requires an NRSRO to furnish the annual certification no later than 90 days after the calendar year.[153] The currently approved OMB annual hour estimate to complete the annual certification is 10 hours per NRSRO, for a total aggregate annual hour burden to the industry of 300 hours. The Commission estimates that once an NRSRO completes its first annual certification with the additional proposed disclosures required in the Instructions to Exhibit 6 to Form NRSRO that the completion of subsequent annual certifications, generally, would take less time because the additional disclosures proposed to be required would be furnished on a regular basis (albeit yearly) and, therefore, become more a matter of routine over time. Consequently, the Commission believes that the annual certifications with the proposed additional discloses would take more time to complete in the first year the rule would become effective, than it would take to complete in subsequent years.

Therefore, based on staff experience, the Commission estimates that with the additional disclosures proposed to be contained in Instructions to Exhibit 6 to Form NRSRO, the annual hour burden for each NRSRO to complete the annual certification would increase 2 hours per year, from 10 to 12 hours, for a total

[145] 15 U.S.C. 78o–7(j). Under this provision of the statute, an NRSRO must ''designate an individual responsible for administering the policies and procedures that are required to be established pursuant to [Sections 15E(g) and (h) of the Exchange Act (15 U.S.C. 78o–7(g) and (h))], and for ensuring compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to [Section 15E of the Exchange Act].'' *Id.*

[146] 30 NRSROs × 20 hours = 600 hours.

[147] $400 per hour × 20 hours = $8,000.

[148] $8,000 × 30 NRSROs = $240,000.

[149] 15 U.S.C. 78o–7(a)(1)(B)(vi).

[150] 2,100 annual hours + [13,000 one-time hours annualized over the three year approval period/3] = 6,433 hours = rounded to 6,400 hours.

[151] 30 NRSROs × 25 hours = 750 hours. The Commission also notes that the currently approved PRA collection for Rule 17g–1 and Form NRSRO includes an estimate that an outside counsel would spend approximately 40 hours assisting a credit rating agency in the process of completing and furnishing a Form NRSRO to the Commission. *June 2007 Adopting Release,* 72 FR at 33608. The Commission believes that any outside counsel review of the amendments to Exhibit 6 to Form NRSRO would *de minimis* and therefore the current estimate remains accurate.

[152] *See* June 2007 Adopting Release, at 72 FR 33609.

[153] 17 CFR 240.17g–4(f). The Commission also notes that if an NRSRO has an annual year end other than December 31st, the proposed additional instructions Exhibit 6 to Form NRSRO would require that the NRSRO file an Update of Registration no later than 90 days following the end of the NRSRO's fiscal year. The Commission believes that the annual hour burden for this proposed collection of information is encompassed within the time it would take an NRSRO to file an amendment to the Form NRSRO which has been estimated to be a 25 annual hour burden per year. The Commission estimates that an NRSRO will on average file two amendments to Form NRSRO per year.

aggregate annual hour burden of 360 hours, resulting in an increase to the estimated annual hour burden for Rule 17g–1 and Form NRSRO of 60 hours.[154]

The Commission preliminarily believes that an applicant/NRSRO would incur only limited internal costs to modify its systems to generate and disclose the proposed additional disclosures in Exhibit 6 to Form NRSRO because an applicant/NRSRO is already required to generate similar financial information in other parts of Form NRSRO and certain financial reports required under Rule 17g–3.

The Commission generally requests comment on all aspects of these proposed burden estimates for Rule 17g–1 and Form NRSRO, as proposed to be amended. Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

3. Proposed Rule 17g–7

The Commission is proposing new Rule 17g–7, which would require an NRSRO, on an annual basis, to make publicly available on its Internet Web site a consolidated report that would contain certain information about the revenues earned by the NRSRO for providing products and services to any obligor, issuer, underwriter, sponsor, and subscriber that paid the NRSRO to issue or maintain the credit rating. In order to generate the report as required by proposed paragraph (a)(1) of Rule 17g–7, the NRSRO would have to perform two calculations and identify any outstanding credit ratings at the end of the fiscal year.

As proposed under new Rule 17g–7, an NRSRO would be required to perform a calculation to state the percentage of net revenue earned by the NRSRO from providing services to the entity that is derived from services other than credit ratings attributable to each person that paid the NRSRO for the issuance or maintenance of a credit rating.

The second calculation that the NRSRO would be required to perform to generate the report once a year as described in paragraph (a)(1)(i) of proposed Rule 17g–7 would require the NRSRO to derive and state the relative standing of the entity as a contributor of revenues to the NRSRO as compared to other entities that contribute revenue to the NRSRO. In particular, the NRSRO would need to identify which of the following cohorts of contributors to the annual net revenue of the NRSRO the entity is included in: top 10%, top 25%, top 50%, bottom 50%, bottom 25%. Finally, once a year an NRSRO would also be required to identify all outstanding credit ratings paid for by the person, which the NRSRO must identify by name of obligor, security, or money market instrument and, as applicable, CIK number, CUSIP, or ISIN.

The Commission also notes that paragraph (a)(2) of proposed Rule 17g–7 would exempt an NRSRO from publishing the reports if, as of the end of the fiscal year, the NRSRO had no credit ratings outstanding that the NRSRO issued or maintained as a result of a person paying the NRSRO for the issuance or maintenance of the credit ratings.[155]

For purposes of the PRA, based on staff experience, the Commission estimates that it would take an NRSRO approximately 100 hours on a one-time basis to develop the calculations necessary to generate the percents required under the report under proposed Rule 17g–7; to populate the proposed report with the required data; and to develop and draft the form report. Additionally, the Commission is basing this one-time hour burden estimate on the Commission's experience with, and burden estimates for, Rules 17g–1 through 17g–6, given that the NRSRO rules have been in effect for over two years.[156] More specifically, the Commission notes that the current one-time hour burden estimates under the PRA for an NRSRO to file a Form NRSRO is 400 hours, and to file an amendment to Form NRSRO is 25 hours.[157]

The Commission preliminarily believes that the report to be required under proposed Rule 17g–7 would be more complex and comprehensive to complete than a typical amendment to Form NRSRO because the new proposed rule would require an NRSRO to calculate percents for every person that paid the NRSRO for the issuance or maintenance of a credit rating. In contrast, however, the Commission preliminarily does not believe that the one-time hour burden to comply with the new Rule 17g–7 would be as extensive and time consuming as the time necessary to complete the initial Form NRSRO. Therefore, the Commission preliminarily believes that the estimate of a one-time burden of 100 hours per respondent is conservative and reasonable given the significant variance in size between the largest NRSROs and the smallest NRSROs. Thus, based on staff experience, the Commission preliminarily estimates that the aggregate initial one-time hour burden to complete the report required by proposed Rule 17g–7 would be 3,000 hours for 30 NRSROs.[158]

In addition to the one-time hour burden, proposed new Rule 17g–7 also would result in an annual hour burden for an NRSRO to generate the percents required under the proposed report and to populate the proposed report with the required data once a year. The Commission notes that an NRSRO would have already developed the equations necessary to generate the percents in order to comply with the new Rule 17g–7 in the first year. Additionally, the Commission believes that once an NRSRO complies with Rule 17g–7 in the first year, that preparation of the new annual report would become more routine. Therefore, based on staff experience, the Commission estimates that it would take an NRSRO approximately 50 hours per year to generate the percents required under the proposed report, as well as to generate the report itself.[159] Thus, the Commission preliminarily estimates that this would result in a total annual hour burden of 1,500 hours for 30 NRSROs.[160]

Proposed Rule 17g–7 also would require an NRSRO to make publicly available on its Internet Web site the report required under paragraph

[154] 12 hours × 30 NRSROs = 360 hours. The Commission also based this estimate, in part, on the time it would take an NRSRO to furnish a withdrawal of registration on Form NRSRO of 1 hour. June 2007 Proposing Release, 72 FR at 33608–33609. However, because the NRSRO would have to update information for calculations with respect to its revenues, the Commission believes it would take an NRSRO longer than 1 hour. Therefore, the Commission preliminarily believes that it would take an NRSRO approximately 2 hours each year to update the proposed information.

[155] For purposes of this collection of information, the Commission has determined that it would preliminarily use 30 respondents in calculating the burden estimates. While some subscriber-based NRSROs would be exempt from new Rule 17g–7, the Commission has preliminarily determined to include all 30 respondents because if a subscriber-paid NRSRO was specifically requested to issue a rating, the NRSRO would no longer be exempt from Rule 17g–7. Therefore, the Commission preliminarily believes that this approach would result in an appropriate PRA estimate for new Rule 17g–7.

[156] *See generally, June 2007 Adopting Release.*

[157] *June 2007 Adopting Release,* 72 FR at 33609; see also February 2009 Adopting Release, 74 FR at 6470.

[158] 100 hours × 30 NRSROs = 3,000 hours.

[159] The Commission based this estimate, in part, on the number of estimated hours it would take an NRSRO to file an amendment to Form NRSRO of 25 hours. The Commission, however, preliminarily believes that it would take an NRSRO substantially more time to generate the information once a year to complete the proposed report under proposed Rule 17g–7. Therefore, the Commission preliminarily estimates that the average time necessary to complete the report under proposed Rule 17g–7 would be more comparable to the time it would take an NRSRO to file 2 amendments to Form NRSRO, or 50 hours (2 × 25 hours).

[160] 50 hours × 30 NRSROs = 1,500 hours.

(a)(1).[161] The Commission estimates that it would take an NRSRO approximately 30 hours to disclose the initial information in its Web site for a total one-time burden of 900 hours,[162] and thereafter 10 hours per year to disclose updated information for a total annual burden of 300 hours.[163] This one-time hour burden is estimated in part based on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO.[164] Accordingly, the Commission estimates that implementation of proposed new Rule 17g–7 would result in a total one-time hour burden of 3,900 [165] hours and a total annual hour burden of 1,800 hours.[166]

The Commission also believes that an NRSRO may need to purchase and/or modify its software and operating systems in order to generate and publish the information proposed to be required in the report in proposed new Rule 17g–7. The Commission estimates that the cost of any software incurred in connection with its systems modifications would vary based on the size and complexity of the NRSRO. The Commission estimates that some NRSROs would not need such software because they may already have such systems in place to generate the proposed report, or given their small size, other NRSROs may find the purchase of additional software unnecessary. The Commission preliminarily believes that an NRSRO would be able to generate and compile the information for the reports using the NRSRO's own personnel. Therefore, based on staff experience, the Commission estimates that the average cost of software across all NRSROs would be approximately $4,000 per firm, with an aggregate one-time cost to the industry of $120,000.[167]

The Commission generally requests comment on all aspects of these burden estimates for proposed Rule 17g–7. In addition, the Commission requests specific comment on the following items related to these burden estimates:

- Would there be additional systems costs or other costs involved in developing this collection of information?
- Given that paragraph (a)(2) of proposed Rule 17g–7 would exempt an NRSRO from publishing the reports if, as of the end of the fiscal year, the NRSRO had no credit ratings outstanding that the NRSRO issued or maintained as a result of a person paying the NRSRO for the issuance or maintenance of the credit ratings, should the Commission revise the number of respondents for this proposed new collection of information? If so, what should the number be?

Commenters should provide specific data and analysis to support any comments they submit with respect to these estimates.

E. Collection of Information Is Mandatory

The collection of information obligations imposed by the proposed rule amendments and the proposed new rule would be mandatory for credit rating agencies that are registered with the Commission as NRSROs. Such registration is voluntary.[168]

F. Confidentiality

The information collected under the proposed amendments to Rule 17g–3 would be generated from the internal records of the NRSRO and would be furnished to the Commission on a confidential basis, to the extent permitted by law.[169] The proposed disclosures that would be required under Exhibit 6 to Form NRSRO and proposed Rule 17g–7 would be public.

G. Record Retention Period

The records required under the proposed amendments to Rules 17g–3 and 17g–7, as well as Exhibit 6 to Form NRSRO would need to be retained by the NRSRO for at least three years.[170]

H. Request for Comment

The Commission requests pursuant to 44 U.S.C. 3306(c)(2)(B) comment on the proposed collections of information in order to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimates of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (4) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and (5) evaluate whether the proposed rule amendments would have any effects on any other collection of information not previously identified in this section.

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, and refer to File No. S7–28–09. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the **Federal Register**; therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for the materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–28–09, and be submitted to the Securities and Exchange Commission, Records Management Office, 100 F Street, NE., Washington, DC 20549.

IX. Costs and Benefits of the Proposed Rules

The Commission is sensitive to the costs and benefits that result from its rules. The Commission has identified certain costs and benefits of the proposed rule amendments and proposed new rule and requests comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in the analysis.[171] The

[161] *See* proposed Rule 17g–7(a)(1).

[162] 30 hours × 30 NRSROs = 900 hours.

[163] 30 NRSROs × 10 hours = 300 hours.

[164] *June 2007 Adopting Release,* 71 FR at 33609.

[165] 3,000 hours + 900 hours = 3,900 total hours for one-time burden.

[166] 1,500 hours + 300 hours = 1,800 total annual hours.

[167] $4,000 × 30 NRSROs = $120,000. As a means of comparison, the Commission notes that the average cost of recordkeeping software across all NRSROs under Rule 17g–2 is estimated to be $1,800 per respondent. *See February 2009 Adopting Release,* 74 FR, at 6472. The Commission preliminarily believes that the one-time cost of purchasing software in order to comply with proposed new Rule 17g–7 would be greater than $1,800 because the proposed rule would require the publication of two new reports not previously required by any rule.

[168] *See* Section 15E of the Exchange Act (15 U.S.C. 78o–7).

[169] 15 U.S.C. 78o–7(k). An NRSRO can request that the Commission keep this information confidential. *See* Section 24 of the Exchange Act (15 U.S.C. 78x), 17 CFR 240.24b–2, 17 CFR 200.80 and 17 CFR 200.83.

[170] 17 CFR 240.17g–2(c).

[171] For the purposes of this cost/benefit analysis, the Commission is using salary data from the Securities Industry and Financial Markets Association (''SIFMA'') Report on Management and Professional Earnings in the Securities Industry 2008, which provides base salary and bonus information for middle-management and professional positions within the securities

Continued

Commission seeks comment and data on the value of the benefits identified. The Commission also seeks comments on the accuracy of its cost estimates in each section of this cost-benefit analysis, and requests those commenters to provide data, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission seeks estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from these proposed rule amendments and the new proposed rule.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.[172] As the Senate Report states, the Rating Agency Act establishes ''fundamental reform and improvement of the designation process'' with the goal that ''eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs.'' [173]

The Commission is proposing to amend Rule 17g–3 to require an NRSRO to furnish the Commission with an additional unaudited report containing a description of the steps taken by the designated compliance officer during the fiscal year to administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act (management of conflicts of interest and prevention of the misuse of material nonpublic information); and ensure compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act.

The Commission's staff understands that the designated compliance officer of some NRSROs may, in some cases, not be fulfilling the compliance officer's statutorily mandated duties, as prescribed by Section 15E(j) of the Exchange Act.[174] Further, during examinations in 2008 of three of the largest NRSROs, Commission staff also identified issues with respect to each NRSRO's policies and procedures and improvements that could be made.[175] In light of these concerns and the importance of an effective NRSRO compliance program, the Commission is proposing to amend Rule 17g–3 by adding paragraph (a)(7), which would require an NRSRO to furnish to the Commission an additional unaudited annual report.

The amendments to proposed new paragraph (a)(7) of Rule 17g–3 would also provide that the report must include: (1) A description of any compliance reviews of the activities of the NRSRO; (2) the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such finding; (3) a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO; and (4) a description of the persons within the NRSRO who were advised of the results of the reviews.[176]

The Commission believes that the proposed amendment to Rule 17g–3 would further address concerns about the integrity of the ratings process by establishing a discipline under which the NRSRO's designated compliance officer would need to report to the Commission the steps taken by the compliance officer to fulfill the officer's responsibilities as set forth in Section 15E(j) of the Exchange Act. The act of reporting these steps is designed to promote the active engagement of the designated compliance officer in reviewing an NRSRO's compliance with internal policies and procedures. The reports also could strengthen the Commission's oversight of NRSROs by highlighting possible problem areas in an NRSRO's rating processes and providing an additional tool for the Commission to monitor how the NRSRO's designated compliance officer is fulfilling the responsibilities prescribed in Section 15E of the Exchange Act. For example, if an NRSRO reports an unusual level of significant compliance exceptions in a particular area, the Commission examination staff could focus their next review of the NRSRO in that particular area. Alternatively, if a report indicates no problems, but a subsequent staff examination reveals significant compliance exceptions, this could be brought to the attention of the NRSRO's management to be used to assess whether the designated compliance officer is adequately fulfilling the officer's statutory duties.

As stated above, the proposed amendment to Rule 17g–3 also would set forth specific items to be included in the proposed new report under Rule 17g–3(a)(7). The first item the Commission is proposing be included in the report is a description of any compliance reviews of the activities of the NRSRO.[177] The Commission intends that the designated compliance officer would describe all such reviews conducted during the most recently ended fiscal year. This would provide the Commission with an understanding of the scope of the designated compliance officer's reviews of the NRSRO's activities. The second item the Commission is proposing be included in the report is the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such finding. The Commission preliminarily intends a ''material compliance matter'' to be the discovery that the NRSRO or a person within the NRSRO had violated the securities laws [178] or the rules thereunder or the policies, procedures, or methodologies established, maintained and enforced by the NRSRO to, for example, determine credit ratings, prevent the misuse of material non-public information, manage conflicts of interest, and comply with the Commission's NRSRO rules.[179] The proposed requirement to report a material compliance matter would be designed to alert the Commission to matters identified by the designated compliance officer that could raise questions about the integrity of the NRSRO's activities and operations. It also could assist the Commission's oversight of NRSROs to the extent a reported material compliance matter is one that could arise in other NRSROs because, for example, it relates to a new

industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. The salary costs derived from the report and referenced in this cost benefit section are modified to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission used comparable estimates in adopting final rules implementing the Rating Agency Act in 2007 and additional rules in 2009, requested comments on such estimates, and received no comments in response to these requests. *See June 2007 Adopting Release*, note 576, and *February 2009 Adopting Release*, note 179. Hereinafter, references to data derived from the report as modified in the manner described above will be cited as ''SIFMA 2008 Report as Modified.''

[172] *See ''Senate Report,''* p. 2.

[173] *Id.*, p. 7.

[174] 15 U.S.C. 78o–7(j).

[175] *See generally*, *Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies* (July 8, 2008). The report is available on the Commission's Internet Web site, located at *http://www.sec.gov/news/studies/2008/craexamination070808.pdf*.

[176] *See* proposed Rule 17g–3(a)(7)(ii).

[177] *See* proposed Rule 17g–3(a)(7)(ii)(A).

[178] The term ''securities laws'' is defined in Section 3(a)(47) of the Exchange Act.

[179] *See e.g.*, 17 CFR 270.38a–1(e)(2); *see also supra* note 37.

type of debt instrument that is being rated by more than one NRSRO or involves interactions with an issuer that hired several NRSROs to rate its securities.

The third item the Commission is proposing be included in the report is a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO.[180] The reporting of these measures could assist the Commission in evaluating the risk of such re-occurrences. It also could provide the Commission with potential ''best practices'' for mitigating the risk of future material compliance matters, which could assist the Commission in its overall supervision of NRSROs. Finally, the fourth item the Commission is proposing be included in the report is a description of the persons within the NRSRO who were advised of the results of the reviews. The information with respect to those persons who were advised of the results of reviews is designed to provide the Commission with an understanding of how the NRSRO responds to material compliance matters and the role and structure of the compliance program within the NRSRO. For example, it would indicate whether the compliance officer reported the matters to the NRSRO's board or senior management or only to the business unit that underwent the compliance review. This is designed to promote the appropriate escalation of compliance issues to the management of the NRSRO. The Commission also believes that this proposed information would be a useful tool for examiners to improve the focus of examination resources of a particular NRSRO on practices related to material compliance matters reported and the possible selection of NRSROs for examination.

In summary, as stated above, the amendments to Rule 17g–3 related to the new unaudited annual report related to the NRSRO's compliance function could serve to improve the NRSRO's compliance function. This improved compliance function, in turn, could improve the integrity of NRSROs' ratings processes.

The Commission also believes that the proposed new report would facilitate improvements to an NRSRO's compliance program in light of the concerns that the designated compliance officer of some NRSROs may, in some cases, not be fulfilling the compliance officer's statutorily mandated duties as prescribed in Section 15E(j) of the Exchange Act. The proposed rule amendments also would further enhance the Commission's oversight of NRSROs by providing the Commission staff an additional resource with which to evaluate the performance of the designated compliance officers in carrying out their statutory responsibilities prescribed in Section 15E(j) of the Exchange Act. In addition to improving the quality of credit ratings, increased oversight of NRSROs could increase the accountability of an NRSRO to its subscribers, investors, and other persons who rely on the credibility and objectivity of a credit rating in making an investment decision.

Finally, the Commission believes that the proposed amendments to Rule 17g–3 would complement the Commission's examination program for NRSROs, and that the proposed amendments would enhance the Commission's ability to protect investors. The requirement to furnish the Commission with an annual report related to an NRSRO's compliance program would serve to help facilitate the examination staff's efforts to conduct each NRSRO examination in an organized and efficient manner and thus to allocate resources to maximize investor protection. The Commission notes that the proposed report would be one of numerous factors the Commission's exam staff may use to determine the focus of a particular exam.

The proposed amendments to the Instructions to Exhibit 6 to Form NRSRO would require an applicant/NRSRO to furnish the Commission with information regarding the revenues an NRSRO receives from major clients and from services other than determining credit ratings. The proposed new information is designed to assist users of NRSRO credit ratings in assessing the potential magnitude of the conflicts of interest inherent in a given NRSRO's business operations. In particular, by disclosing information about revenues received from major clients and other services, users of credit ratings would have access to more information about conflicts of interest that may exist when the NRSRO is being paid to determine credit ratings and is offering other services to persons who pay for ratings. The Commission believes these enhanced disclosures would allow users of credit ratings to more effectively assess the conflicts of interest affecting an NRSRO. Although the disclosures an NRSRO provides on the Form NRSRO, including the proposed additional disclosures to Exhibit 6 to Form NRSRO cannot substitute for an investor's due diligence in evaluating a credit rating and the integrity of an NRSRO, the Commission believes the proposed amendment to Exhibit 6 to Form NRSRO would aid investors by providing additional publicly accessible information about an NRSRO.

The first proposed new disclosure in Exhibit 6 would require that an applicant/NRSRO disclose the percentage of total net revenue attributable to the 20 largest users of credit rating services of the applicant/NRSRO. The Commission preliminarily believes this disclosure would assist investors and other users of credit ratings by providing them with an understanding of the degree to which revenues earned by the NRSRO come from a concentrated base of customers. This could be useful in understanding the conflicts inherent in the NRSRO's business given that an increase in concentration would result in an increase in the potential risk that the customers could use their contribution to the NRSRO's revenues to influence the objectivity of its credit ratings. Making the degree of this concentration transparent would allow investors and market participants to take this potential risk into account when considering the accuracy and reliability of the NRSRO's credit ratings. This, in turn, could improve the integrity of NRSROs. Increased confidence in the integrity of NRSROs and the credit ratings they issue could promote participation in the securities markets. In addition, the Commission believes that the proposed disclosures would allow investors and market participants to more effectively compare the concentrations across all NRSROs.

The second proposed new disclosure would require the applicant/NRSRO to disclose the percentage of total revenue attributable to other services and products of the applicant/NRSRO. The Commission preliminarily believes this information would be useful to investors and other users of credit ratings because it would provide scale to the amount of revenues an NRSRO earns from providing services other than credit ratings. An NRSRO that obtains substantial revenues from other services may be inclined to favor a client that purchases those other services when determining credit ratings solicited by the client. Consequently, creating greater transparency about the revenues generated from other services could assist investors and other users of credit ratings in assessing the potential risks to the NRSRO's objectivity.

Proposed Rule 17g–7 would require an NRSRO to make publicly available on its Internet Web site a consolidated

[180] *See* proposed Rule 17g–3(a)(7)(ii)(C).

report, which would need to be updated annually, containing information about the revenues earned by the NRSRO as a result of providing services and products to persons that paid the NRSRO to issue or maintain a credit rating. The Commission preliminarily believes that proposed Rule 17g–7 would provide users of credit ratings with information about the potential risk that arises when an NRSRO is paid to determine a credit rating for a specific obligor, security, or money market instrument—the risk that the revenue generated from the person paying the NRSRO to determine a credit rating could influence the NRSRO's objectivity if the NRSRO feels the need to curry favor from that person with a corresponding negative impact on the quality and accuracy of the credit rating. Simply put, it could cause the credit rating agency to determine a higher than warranted credit rating, which, as a result, does not accurately reflect the NRSRO's true view of the level of credit risk inherent in the obligor, security, or money market instrument. Providing users of credit ratings with the information on revenue generated from other services provided to the person paying the NRSRO for the issuance or maintenance of the credit rating and on the relative standing of the entity as a contributor of revenue to the NRSRO would enable them to better assess the degree that a particular rating may be subject to this risk.

In addition, proposed Rule 17g–7 could have the benefit of helping to mitigate the potential ability an obligor, issuer, underwriter, sponsor, and subscriber as a large consumer of the services and products of the NRSRO from using its status to exert undue influence on the NRSRO. Specifically, by making the potential conflict more transparent to the marketplace, users of credit ratings, market participants, and others could assess how credit ratings solicited by large revenue providers are handled by the NRSRO, particularly with respect to NRSROs that make their ratings publicly available for free.

As stated above, the Commission also believes that the reports that would be required to be published by proposed Rule 17g–7 would create greater transparency about the revenues generated from other services and could assist investors and other users of credit ratings in assessing the potential risks to the NRSRO's objectivity by providing investors and other users of credit ratings with information to assess the degree of risk that a credit rating may be compromised by the undue influence of the person that paid for the issuance or maintenance of the credit rating. The Commission generally requests comment on all aspects of the proposed new rule. In addition, the Commission requests specific comment on the following items related to these benefits.

- Are there metrics available to quantify these benefits and any other benefits the commenter may identify, including the identification of sources of empirical data that could be used for such metrics?
- With respect to Rule 17g–7, to what use do users of credit ratings anticipate putting the proposed disclosures? To what extent, if any, might these disclosures create misimpressions as to the existence of potential conflicts? Are the proposed disclosures in proposed Rule 17g–7 granular enough to be of value to users of credit ratings? Commenters should provide specific data and analysis to support any comments they submit with respect to the benefits discussed above and any other benefits identified by the commenters.

B. Costs

The Commission recognizes that there are potential costs that would result if the Commission adopts the proposed rule amendments to Rule 17g–3,[181] Exhibit 6 to Form NRSRO and proposed new Rule 17g–7. The Commission preliminarily believes that potential costs incurred by an NRSRO to comply with the proposed rule amendments to a given NRSRO would depend on its size and the complexity of its business activities. The size and complexity of NRSROs vary significantly. Therefore, the cost could vary significantly across NRSROs. The Commission is providing estimates of the average cost per NRSRO taking into consideration the variance in size and complexity of NRSROs. Any costs incurred would also vary depending on which classes of credit ratings an NRSRO issues and how many outstanding ratings it has in each class. For these reasons, the cost estimates represent the average cost across all NRSROs.

1. Proposed Amendments to Rule 17g–3

Rule 17g–3 requires an NRSRO to furnish audited annual financial statements to the Commission, including certain specified schedules.[182] The Commission is proposing to amend Rule 17g–3 to require an NRSRO to furnish the Commission with an additional unaudited report containing a description of the steps taken by the designated compliance officer during the fiscal year to administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act; and ensure compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act. The proposed amendments to Rule 17g–3 also would provide that the report must include: (1) A description of any compliance reviews of the activities of the NRSRO; (2) the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such matter; (3) a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO; and (4) a description of the persons within the NRSRO who were advised of the results of the reviews.[183]

The Commission believes that the costs to NRSROs to comply with the proposed amendment to Rule 17g–3 would vary depending on the size and complexity of the NRSRO, as well as the size of its compliance programs. Larger NRSROs with comprehensive compliance programs may already periodically review portions of their compliance programs. These larger NRSROs may incur a cost associated with transforming their periodic reviews into more systematic reviews and developing the report to be required under Rule 17g–3. While smaller NRSROs all have designated compliance officers, the Commission preliminarily believes, based on issues brought to the staff's attention, that some NRSROs may have less robust compliance programs than others. The Commission believes, however, that the information to be included in the proposed report under the amendments to Rule 17g–3 for smaller NRSROs would be less extensive, because smaller NRSROs may have less complex organizational structures, fewer employees and fewer sources of revenue than larger NRSROs which may be part of a complex global organization with thousands of employees. Therefore, it may be less costly than for larger NRSROs.

Further, the Commission notes that the proposed report would explicitly require the NRSRO to describe the steps taken by the designated compliance officer during the fiscal year to administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of

[181] *See* proposed Rule 17g–3(a)(7).

[182] 17 CFR 240.17g–3.

[183] *See* proposed Rule 17g–3(a)(7)(ii).

Section 15E of the Exchange Act; and ensure compliance with the securities laws and rules and regulations thereunder. Since these are statutorily mandated responsibilities of the designated compliance officer under Section 15E(j) of the Exchange Act, the Commission notes that certain costs are already being incurred by the NRSRO and therefore are not direct costs of the proposed amendments to Rule 17g–3. The Commission has preliminarily quantified certain costs with respect to the amendments to Rule 17g–3 which are discussed in detail below.

As discussed with respect to the PRA, the Commission preliminarily believes that the estimated hour burden under the proposed amendments to Rule 17a–3 would include the time it would take to compile information to draft the report and the preparation and filing of the report itself. In addition, this one-time hour burden estimate also includes the time it would take to identify and describe material compliance matters, any remediation and the persons advised of the results of the reviews. Consequently, the Commission also based this estimate, in part, on the average estimated number of hours it would currently take an NRSRO to complete one annual report under current Rule 17g–3 (*i.e.,* approximately 30 hours).[184] Consequently, as discussed above with respect to the PRA, the Commission estimates that the average amount of time across all NRSROs to prepare the additional report proposed to be required under the rule would be approximately 900 hours [185] at a total aggregate annual cost to the industry of $232,200.[186]

Given the potentially sensitive nature of the proposed report, the Commission also preliminarily believes that an NRSRO would likely engage outside counsel to assist it in the process of drafting and reviewing the proposed report under Rule 17g–3 on a one-time basis. The Commission estimates that the time an outside attorney would spend on this work would depend on the size and complexity of the NRSRO. Therefore, the Commission estimates that, on average, an outside counsel would spend approximately 20 hours assisting an NRSRO and its designated compliance officer in drafting and reviewing the proposed report on a one-time basis for an aggregate burden to the industry of 600 hours.[187] Based on industry sources, the Commission estimates that the cost of an outside counsel would be approximately $400 per hour. For these reasons, the Commission estimates that the average one-time cost to an NRSRO would be approximately $8,000 [188] and the one-time cost to the industry would be approximately $240,000.[189]

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendments to Rule 17g–3. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would an NRSRO incur any additional costs to employ an outside counsel on an annual basis to review the proposed 17g–3 report, rather than just on a one-time basis?
- Would the cost incurred by an NRSRO be less than those estimated because the designated compliance officer is already performing many of the responsibilities required to be described in the proposed report, as well as drafting compliance reports?
- What other costs are NRSROs likely to incur?
- Are the proposals likely to impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?

Commenters should provide specific data and analysis to support any comments they submit with respect to the costs discussed above and any other costs identified by commenters.

2. Proposed Amendments to Form NRSRO

The proposed amendments to the Instructions to Exhibit 6 of Form NRSRO would require an applicant/NRSRO to furnish the Commission with information regarding the revenues an NRSRO receives from major clients and from products and services other than determining credit ratings. In particular, the additional disclosures to Exhibit 6 would require an applicant/NRSRO to provide the following disclosures, as applicable:

- The percentage of the applicant/NRSRO's net revenue attributable to the 20 largest users of credit rating services of the applicant/NRSRO; and
- The percentage of the applicant/NRSRO's revenue attributable to services and products other than credit rating services of the applicant/NRSRO.

The Commission believes that the costs to NRSROs to comply with the proposed amendment to Exhibit 6 to Form NRSRO would vary depending on the size and complexity of the NRSRO. Larger NRSROs may have more customers and complex revenue streams, while smaller NRSROs may be less complex in terms of sources of revenue or numbers of customers. Consequently, as discussed above with respect to the PRA, the Commission estimates that the average time necessary for an applicant or NRSRO to gather the information on a one-time basis in order to complete the additional disclosures proposed to be required by the amendments to Exhibit 6 to Form NRSRO would be one-time hour burden to the industry of 750 hours.[190] For these reasons, the Commission estimates that the average one-time cost to an NRSRO would be $6,520 [191] and the total aggregate one-time cost to the industry would be $195,600.[192]

In addition, with respect to the PRA, the Commission estimated that the average annual burden to complete an annual certification under Rule 17g–1(f) would increase 60 hours for all NRSROs.[193] For these reasons, the Commission estimates that the average annual cost with respect to the proposed amendment to an NRSRO would be $516 [194] and the total aggregate annual cost to the industry would be $15,480.[195]

The Commission also notes that included in the current estimated costs for the Form NRSRO are the costs related to the engagement of outside counsel to assist in the process of completing and submitting a Form NRSRO.[196] In the *June 2007 Proposing Release,* the Commission estimated that the amount of time an outside attorney

[184] 15 U.S.C. 78o–7(j). Under this provision of the statute, an NRSRO must ''designate an individual responsible for administering the policies and procedures that are required to be established pursuant to [Sections 15E(g) and (h) of the Exchange Act (15 U.S.C. 78o–7(g) and (h))], and for ensuring compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to [Section 15E of the Exchange Act].'' *Id.*

[185] 30 hours × 30 NRSROs = 900 hours.

[186] $7,740 × 30 NRSROs = $232,200.

[187] 30 NRSROs × 20 hours = 600 hours.

[188] $400 per hour × 20 hours = $8,000.

[189] $8,000 × 30 NRSROs = $240,000.

[190] 30 NRSROs × 25 hours = 750 hours.

[191] The Commission estimates that these responsibilities would be split between a Financial Reporting Manager (10 hours) and a Compliance Manager (15 hours). The SIA Management Report 2008 indicates that the average hourly cost for a Financial Reporting Manager is $265 and for a Compliance Manager is $258. Therefore, the average one-time cost would be $6,520 [(10 hours × $265 per hour) + (15 hours × $258 per hour)].

[192] $6,520 × 30 NRSROs = $195,600.

[193] 2 hours × 30 NRSROs = 60 hours.

[194] The Commission estimates that these responsibilities would be performed by a Compliance Manager. The SIA Management Report 2008 indicates that the average hourly cost for a Compliance Manager is $258. Therefore, the average annual cost to an NRSRO would be $516 (2 hours × $258).

[195] $516 × 30 NRSROs = $15,480.

[196] *June 2007 Adopting Release,* 72 FR at 33614.

will spend on this work will depend on the size and complexity of the NRSRO. Therefore, the Commission estimated that, on average, an outside counsel will spend approximately 40 hours assisting an NRSRO in preparing its application for registration. The Commission further estimated that the average hourly cost for an outside counsel will be approximately $400 per hour. For these reasons, the Commission estimated that the average one-time cost to an NRSRO will be $16,000 and the one-time cost to the industry will be $480,000.[197] With respect to the proposed amendments to Exhibit 6 to Form NRSRO, the Commission estimates that the cost to outside counsel to review a Form NRSRO containing the additional disclosures to Exhibit 6 to Form NRSRO would already be included within the original cost estimate for Rule 17g–1 and Form NRSRO[198] or that such costs would be *de minimis.*[199]

As discussed above with respect to the PRA, the Commission preliminarily believes that an applicant/NRSRO would incur only limited internal costs to modify its systems to generate and disclose the proposed additional disclosures in Exhibit 6 to Form NRSRO because an applicant/NRSRO is already required to generate similar financial information in other parts of Form NRSRO and certain financial reports required under Rule 17g–3.

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendment to Form NRSRO. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Whether the proposals would impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?
- Would the one-time cost to engage an outside counsel to assist in the preparation of the Form NRSRO increase as a result of the amendments to Exhibit 6 to Form NRSRO?
- Would the proposed disclosures in Exhibit 6 to Form NRSRO have any effect on the willingness of persons to pay for ratings as well as other credit rating services? What are the risks that investors and other users of credit ratings would be confused as to the significance of the revenue-based conflicts of interest being disclosed as a result of the proposed amendments to Exhibit 6 to Form NRSRO?

Commenters should provide specific data and analysis to support any comments they submit with respect to the costs discussed above and any other costs identified by commenters.

3. Proposed Rule 17g–7

Proposed Rule 17g–7 would require an NRSRO to make publicly available on its Internet Web site a consolidated report containing information about the revenues earned by the NRSRO as a result of providing services and products to persons that paid the NRSRO to issue or maintain a credit rating. This report would need to be updated annually. As discussed above with respect to PRA, the Commission estimates that it would take an NRSRO approximately 100 hours to develop the calculations necessary to generate the percents required by the report under proposed Rule 17g–7; to populate the proposed report with the required data; and to develop and draft the form report. The Commission estimates that the proposed new Rule 17g–7 would impose a total one-time hour burden of 3,000 hours for 30 NRSROs to prepare the report. The Commission estimates that the average one-time cost to an NRSRO would be $23,500[200] and the total aggregate one-time cost for all NRSROs would be $705,000.[201]

As discussed above with respect to the PRA, the Commission also estimates that after the first year it would take NRSRO 50 hours per year to generate the percents required under the proposed report and to populate the proposed report with the required data once a year. Therefore, the Commission estimates that the average annual cost to an NRSRO would be $3,150[202] and the total aggregate annual cost to the industry would be $94,500 to generate the proposed report once a year.[203]

Proposed Rule 17g–7 would also require an NRSRO to make publicly available on its Internet Web site the report required under paragraph (a)(1). As discussed with respect to the PRA, the Commission estimates that it would take an NRSRO approximately 30 hours to disclose the initial information in its Web site for a total one-time burden of 900 hours, and thereafter 10 hours per year to disclose updated information for an annual hour burden of 300 hours. The Commission estimates that an NRSRO would incur an average one-time cost of $8,760 and an average annual cost of $2,920.[204] The total one-time cost to the industry would be approximately $262,800[205] and the total aggregate annual cost to the industry would be approximately $87,600.[206]

Finally, the Commission also believes that an NRSRO may need to purchase and/or modify its software and operating systems in order to generate and publish the information required in the proposed reports in proposed Rule 17g–7. As discussed in the PRA, the Commission estimates that the cost of any software would vary based on the size and complexity of the NRSRO. The Commission estimates that some NRSROs would not need such software. Therefore, the Commission estimates that the average cost of software across all NRSROs would be approximately $120,000.[207]

The Commission generally requests comment on all aspects of these cost estimates for the proposed Rule 17g–7. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?
- Would the proposed disclosures in new Rule 17g–7 have any effect on the willingness of persons to pay for ratings and other credit rating services? What are the risks that investors and other users of credit ratings would be confused as to the significance of the information being disclosed as a result of new Rule 17g–7?

[197] *Id.*

[198] *Id.*

[199] The Commission believes that the review of the additional disclosures would overlap with the review of similar financial information already required to be disclosed in Exhibits 10 and 12 in Form NRSRO.

[200] The Commission estimates an NRSRO would have a Senior Accountant and a Senior Programmer working together to generate the initial calculations and report and that the two senior officers would divide the estimated 100 hours equally. The SIFMA 2008 Report as Modified indicates that the average hourly cost for a Senior Accountant is $178 and that the average hourly cost for a Senior Programmer is $292. Therefore, the average one-time cost to an NRSRO would be $23,500 (50 hours × $178) + (50 hours × $292).

[201] 30 NRSROs × $23,500 = $705,000.

[202] The Commission estimates that after the equations and initial report has been developed that an NRSRO would have a Compliance Clerk perform the necessary tasks to generate the annual report. The SIFMA 2008 Office Salaries Report as Modified indicates that the average hourly cost for a Compliance Clerk is $63. Therefore, the average yearly cost to an NRSRO would be $3,150 (50 hours × $63).

[203] $3,150 × 30 NRSROs = $94,500.

[204] The Commission estimates that an NRSRO will have a Senior Programmer perform this work. The SIFMA 2008 Report as Modified indicates that a Senior Programmer is $292. Therefore the average one-time cost will be $8,760 (30 hours × $292) and the average annual cost will be $2,920 (10 hours × $292).

[205] $8,760 × 30 NRSROs = $262,800.

[206] $2,920 × 30 NRSROs = $87,600.

[207] $4,000 × 30 NRSROs = $120,000.

• Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?

• To what extent, if any, might issuers shift to larger NRSROs in which their revenue contribution would contribute a lower percentage to the NRSROs overall revenue to avoid being in a particular tier?

Commenters should provide specific data and analysis to support any comments they submit with respect to the costs discussed above and any other costs identified by commenters.

X. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Under Section 3(f) of the Exchange Act,[208] the Commission shall, when engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act [209] requires the Commission to consider the anticompetitive effects of any rules the Commission adopts under the Exchange Act. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As discussed below, the Commission's preliminary view is that the proposed rule amendments may promote efficiency, competition, and capital formation.

The Commission generally requests comment on all aspects of this analysis of the burden on competition and promotion of efficiency, competition, and capital formation.

Commenters should provide specific data and analysis to support their views.

A. Rule 17g–3

The proposed amendment to Rule 17g–3 [210] would require an NRSRO to furnish the Commission with an additional unaudited report containing a description of the steps taken by the designated compliance officer during the fiscal year to administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act; and ensure compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act.[211]

The amendments to Rule 17g–3 also would provide that the proposed report must include: (1) A description of any compliance reviews of the activities of the NRSRO; (2) the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such matter; (3) a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO; and (4) a description of the persons within the NRSRO who were advised of the results of the reviews. As stated above, the proposed new report would be unaudited, consistent with the other unaudited reports currently required under Rule 17g–3.[212]

The Commission believes that the proposed amendments to Rule 17g–3 could indirectly increase efficiency in a number of ways. The proposed amendments to Rule 17g–3 may improve the efficiency of the credit ratings process by establishing a more structured discipline under which the NRSRO's designated compliance officer would need to report to the Commission the steps taken to fulfill the officer's statutory responsibilities. The act of reporting these steps is designed to promote the active engagement of the designated compliance officer in reviewing an NRSRO's compliance with the securities laws and its own internal policies and procedures.

The Commission also believes that improved compliance as a result of the proposed rule amendments may increase efficiency in the credit ratings process by focusing the NRSRO's designated compliance officer in fulfilling his or her responsibilities prescribed under Section 15E(j) of the Exchange Act, as well as by facilitating an NRSRO's early intervention to decrease the severity of compliance violations which may occur. Because the compliance officer would be required to report these steps, the proposed amendments may foster improved compliance overall. This may, in turn, promote greater efficiencies in the credit rating process.

The Commission further believes that these proposed amendments could promote more efficient allocation of capital by investors to the extent that the quality of credit ratings is improved.

Additionally, the Commission believes that the proposed report could promote efficient allocation of Commission resources and time by facilitating the Commission's examination staff efforts to conduct each exam of an NRSRO in an organized and efficient manner. These efficiencies will help the Commission to better allocate its own resources to maximize investor protection.[213]

The Commission believes that the proposed amendments to Rule 17g–3 could promote participation in the securities markets, and, thereby, promote capital formation and competition among NRSROs by increasing confidence in the integrity of NRSROs and the credit ratings they issue. Consequently, the Commission also does not believe that the proposed amendments to Rule 17g–3 would be a burden on competition.

The proposed amendments to Rule 17g–3 could improve the integrity of the ratings process by establishing a discipline under which the NRSRO's designated compliance officer would need to report to the Commission the steps taken by the compliance officer to fulfill the officer's statutory responsibilities. The act of reporting these steps is designed to promote the active engagement of the designated compliance officer in reviewing an NRSRO's compliance with internal policies and procedures. The proposed report also could strengthen the Commission's oversight of NRSROs by highlighting possible problem areas in an NRSRO's rating processes and providing an additional tool for the Commission to monitor how the NRSRO's designated compliance officer is fulfilling the responsibilities prescribed in Section 15E of the Exchange Act. For example, if an NRSRO reports an unusual level of significant compliance exceptions in a particular area, the Commission examination staff could focus their next review of the NRSRO in that particular area. Alternatively, if a report indicates no problems, but a subsequent staff examination reveals significant compliance exceptions, this could be brought to the attention of the NRSRO's management to be used to assess whether the designated compliance

[208] 15 U.S.C. 78c(f).

[209] 15 U.S.C. 78w(a)(2).

[210] *See* proposed Rule 17g–3(a)(7).

[211] *See* proposed Rule 17g–3(a)(7).

[212] 17 CFR 240.17g–3(a)(2)–(6). Under Rule 17g–3, the only required audited report is the NRSRO's financial statements as of its most recent fiscal year. 17 CFR 240.17g–3(a)(1).

[213] The Commission also notes that other areas of the Commissions rules and regulations also require an annual report by a chief compliance officer with respect to investment companies and investment advisers. *See generally,* Rule 38a–1, 17 CFR 270.38a–1, and Rule 206(4)–7, 17 CFR 275.206(4)–7.

officer is adequately fulfilling the officer's statutory duties. Furthermore, the identification of the persons within the NRSRO advised of the results of the review and remediation measures implemented could also promote the appropriate escalation of compliance issues to the management of the NRSRO.

Thus, enhancing the Commission's oversight and improving compliance of the NRSROs could help in restoring confidence in credit ratings issued by NRSROs which, in turn, could promote capital formation.

B. Amendments to Form NRSRO

The proposed amendments to the Instructions to Exhibit 6 to Form NRSRO are designed to provide more information to users of credit ratings with respect to an NRSRO's conflicts of interest. The Commission is proposing to require an applicant/NRSRO to furnish the Commission with information regarding the revenues an NRSRO receives from major clients and from services other than determining credit ratings. In particular, the additional disclosures to Exhibit 6 to Form NRSRO would require an applicant/NRSRO to provide the following disclosures, as applicable:

- The percentage of the applicant/NRSRO's net revenue attributable to the 20 largest users of credit rating services of the applicant/NRSRO; and
- The percentage of the applicant/NRSRO's revenue attributable to services and products other than credit rating services of the applicant/NRSRO.

By assisting investors and other users of credit ratings in assessing the potential magnitude of the conflicts of interest inherent in a given NRSRO's business operations, the proposed additional disclosures to Exhibit 6 to Form NRSRO may promote more efficient investment analyses and decisions by these investors and users.

The proposed additional disclosures are designed to provide the marketplace with additional information for comparing NRSROs and, therefore, provide users of credit ratings with more useful metrics with which to compare these NRSROs. In particular, by disclosing information about revenues received from major clients and for other services, users of credit ratings would be given more information about the potential dimensions of the conflict of being paid to determine credit ratings and offering other services to persons who pay for ratings. Increased disclosure of these conflicts would make the incentives of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that may have fewer or less significant conflicts of interest. These proposed disclosures would allow investors and other users of credit ratings to compare concentrations of revenue across all NRSROs, thus promoting efficiency for investors and other users of credit ratings in evaluating NRSROs and a particular credit rating in making an investment decision.

The Commission further believes that these proposed amendments could promote more efficient allocation of capital by investors to the extent that the quality of credit ratings is improved.

These proposed disclosures are also designed to increase competition and promote capital formation by restoring confidence in the NRSROs credit ratings, which are an integral part of the capital formation process.

By proposing to provide more information about an NRSRO's conflicts of interest, investors and users of credit ratings will be better able to evaluate the integrity of an NRSRO and the credit ratings that it issues. This enhanced information, in turn, may promote greater competition among NRSROs for the business of those users and investors. Consequently, the Commission does not believe that the proposed disclosures would be a burden on competition among NRSROs.

Moreover, because users of credit ratings would have greater confidence in the integrity of the NRSROs as well as the credit ratings that they issue, such increased confidence could promote investor participation in the securities markets, and, thereby, promote capital formation.

C. Rule 17g–7

The Commission also is proposing to adopt a new rule—Rule 17g–7—which would require an NRSRO to make publicly available on its Internet Web site a consolidated report containing information about the revenues earned by the NRSRO as a result of providing services and products to persons that paid the NRSRO to issue or maintain a credit rating. This report would need to be updated annually. Specifically, proposed Rule 17g–7 would require the NRSRO to include in the report: (1) The percent of the net revenue attributable to the person that paid the NRSRO that were earned by the NRSRO during the most recently ended fiscal year from providing services and products other than credit rating services to the person; (2) the relative standing of the person in terms of the person's contribution to the NRSRO's net revenue as compared with other persons that contributed to the NRSRO's net revenues; and (3) the identity of all outstanding credit ratings issued by the NRSRO and paid for by the person.

The Commission preliminarily believes that proposed Rule 17g–7 would provide users of credit ratings with information about the potential risk that arises when an NRSRO is paid to determine a credit rating for a specific obligor, security, or money market instrument. Namely, the risk that the revenue generated from the person soliciting the NRSRO to determine a credit rating could influence the NRSRO's objectivity in an effort to favor with that person with a corresponding negative impact on the quality and accuracy of the credit rating.

By assisting investors and other users of credit ratings in analyzing the nature and degree of potential conflicts, proposed Rule 17g–7 may promote more efficient investment analyses and decisions by these investors and users.

The proposed additional disclosures are designed to provide the marketplace with additional information for comparing NRSROs and, therefore, provide users of credit ratings with more useful metrics with which to compare these NRSROs. The Commission believes that the enhanced disclosure requirements of proposed Rule 17g–7 may enable investors and other users of credit ratings to better assess when and to what degree a NRSRO's objectivity may be compromised. Increased disclosures also will make the incentives of the NRSROs more transparent to the marketplace. Based on this information, investors and users of credit ratings issued by an NRSRO may make more informed investment decisions when considering credit ratings, which could promote efficiency.

The Commission further believes that these proposed amendments could promote more efficient allocation of capital by investors to the extent that the quality of credit ratings is improved.

These proposed disclosures, like the proposed additional disclosures to Form NRSRO, are designed to increase competition and promote capital formation by restoring confidence in the credit ratings. By providing more information about the nature and extent of potential revenue-based conflicts, investors and users of credit ratings will be better able to evaluate the integrity of an NRSRO and the credit ratings that it issues and assess whether its objectivity may be compromised. This enhanced information, in turn, may promote greater competition among NRSROs for the business of those users and investors.

A risk, however, exists with respect to proposed Rule 17g–7 that competition may be negatively impacted to the extent that issuers shift to larger NRSROs in which their revenue contribution will likely make up a smaller percentage of revenue to avoid any potential ''stigma'' associated with being perceived as a large client of an NRSRO.

Moreover, because users of credit ratings would have greater confidence in the integrity of the NRSROs as well as the credit ratings that they issue, such increased confidence could promote investor participation in the securities markets, and, thereby, promote capital formation.

XI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [214] the Commission must advise OMB whether a proposed regulation constitutes a major rule. Under SBREFA, a rule is ''major'' if it has resulted in, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- A significant adverse effect on competition, investment, or innovation.

If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requests comment on the potential impact of the proposed rule amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

XII. Initial Regulatory Flexibility Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis (''IRFA''), in accordance with the provisions of the Regulatory Flexibility Act,[215] regarding the proposed rule amendments to Rule 17g–3 and Form NRSRO under the Exchange Act and proposed new Rule 17g–7.

A. Reasons for the Proposed Action

The proposed amendments and proposed new rule would prescribe additional requirements for NRSROs to address concerns raised about the role of credit rating agencies in the recent credit market turmoil. The proposed amendments and proposed new rule would enhance and strengthen the rules the Commission to implement specific provisions of the Rating Agency Act.[216] The Rating Agency Act defines the term ''nationally recognized statistical rating organization'' as a credit rating agency registered with the Commission, provides authority for the Commission to implement registration, recordkeeping, financial reporting, and oversight rules with respect to registered credit rating agencies.

As discussed in detail above, the proposed amendments seek to further the substantive goals of the Commission's current oversight program for NRSROs, including, increasing transparency and disclosure, diminishing conflicts, and strengthening oversight more generally.[217]

The Commission believes that the proposed amendments to Rule 17g–3 would improve the integrity of the ratings process by establishing a discipline under which the NRSRO's designated compliance officer would need to report to the Commission the steps taken by the compliance officer to fulfill the officer's statutory responsibilities.[218] The act of reporting these steps is designed to promote the active engagement of the designated compliance officer in reviewing an NRSRO's compliance with internal policies and procedures. The proposed report also could strengthen the Commission's oversight of NRSROs by highlighting possible problem areas in an NRSRO's rating processes and providing an additional tool for the Commission to monitor how the NRSRO's designated compliance officer is fulfilling the responsibilities prescribed in Section 15E of the Exchange Act. Furthermore, the identification of the persons within the NRSRO advised of the results of the review and remediation measures implemented could also promote the appropriate escalation of compliance issues to the management of the NRSRO.

The Commission believes that the proposed amendments to Exhibit 6 to the Instructions to Form NRSRO would allow users of credit ratings to more effectively evaluate the integrity of the NRSRO's credit ratings themselves and whether they believe the NRSRO is effectively managing its conflicts of interests otherwise identified in Exhibit 6. Finally, the purpose of proposed new Rule 17g–7 is to provide users of credit ratings with information about the potential risk that arises when an NRSRO is paid to determine a credit rating for a specific obligor, security, or money market instrument.

B. Objectives

The objectives of the Rating Agency Act are ''to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.'' [219] The proposed amendments and proposed new rule are designed to further enhance these objectives and assist the Commission in monitoring whether an NRSRO complies with the provisions of the Rating Agency Act and rules thereunder, fulfilling the Commission's statutory mandate to adopt rules to implement the NRSRO regulatory program, and provide information regarding NRSROs to the public and to users of credit ratings.

The objective of the proposed amendment to Rule 17g–3 is to improve the integrity of the ratings process and enhance accountability by requiring the designated compliance officer to annually report on actions taken to fulfill the officer's statutory responsibilities. The requirement to provide the Commission with such a report would, the Commission believes, help establish or reinforce a discipline and rigor in the compliance officer's performance of his or her duties. It also is designed to strengthen the Commission's oversight of NRSROs by highlighting possible problem areas in an NRSRO's rating processes and providing an additional tool for the Commission to determine whether the NRSRO's designated compliance officer is fulfilling the responsibilities prescribed in Section 15E of the Exchange Act.[220] In addition, this information is designed to assist the Commission staff in its examination of NRSROs. Furthermore, the identification of the persons within the NRSRO advised of the results of the review and remediation measures implemented could also promote the appropriate escalation of compliance issues to the management of the NRSRO.

The proposed amendments to the Exhibit 6 Instructions to Form NRSRO that would require additional disclosures are designed to increase

[214] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[215] 5 U.S.C. 603.

[216] Pub. L. 109–291 (2006); *see also* Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564, 33609 (June 18, 2007).

[217] *See* Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 3850, Credit Rating Agency Reform Act of 2006, S. Report No. 109–326, 109th Cong., 2d Sess. (Sept. 6, 2006) (''Senate Report''), p. 2.

[218] *See* proposed Rule 17g–3(a)(7) and (b)(2).

[219] *See Senate Report*, *supra note 217*.

[220] 15 U.S.C. 78o–7(j).

transparency by allowing users of credit ratings to more effectively evaluate the integrity of an NRSRO's credit ratings and analyze whether the NRSRO is effectively managing its conflicts of interest.

Finally, proposed new Rule 17g–7 is designed to increase transparency as well as enhance disclosures with respect to an NRSRO's management of its conflicts of interest by providing users of credit ratings with information about the potential risk of undue influence that arises when an NRSRO is paid to determine a credit rating for a specific obligor, security, or money market instrument.

C. Legal Basis

Pursuant to the Exchange Act [221] and, particularly, Sections 15E and 17(a) of the Exchange Act, the Commission is proposing amendments to Rule 17g–3 and Exhibit 6 to Form NRSRO, as well as proposing new Rule 17g–7.[222]

D. Small Entities Subject to the Rule

Paragraph (a) of Rule 0–10 provides that for purposes of the Regulatory Flexibility Act, a small entity ''[w]hen used with reference to an 'issuer' or a 'person' other than an investment company'' means ''an 'issuer' or 'person' that, on the last day of its most recent fiscal year, had total assets of $5 million or less.'' [223] The Commission believes that an NRSRO with total assets of $5 million or less would qualify as a ''small'' entity for purposes of the Regulatory Flexibility Act. Currently, there are two NRSROs that are classified as ''small'' entities for purposes of the Regulatory Flexibility Act.[224]

E. Reporting, Recordkeeping, and Other Compliance Requirements

The proposal would amend Rule 17g–3 to require an NRSRO to furnish the Commission with an additional unaudited annual report containing a description of the steps taken by the designated compliance officer during the fiscal year to administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act; and ensure compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act.[225]

The amendments to proposed new paragraph (a)(7) of Rule 17g–3 would also provide that the report must include: (1) A description of any compliance reviews of the activities of the NRSRO; (2) the number of material compliance matters identified during each review of the activities of the NRSRO and a brief description of each such matter; (3) a description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the NRSRO; and (4) a description of the persons within the NRSRO who were advised of the results of the reviews.[226]

The Commission believes that the costs to NRSROs to comply with the proposed amendment to Rule 17g–3 would vary depending on the size and complexity of the NRSRO, as well as the size of its compliance programs. Larger NRSROs with comprehensive compliance programs may already periodically review portions of their compliance programs. These larger NRSROs may incur a cost associated with transforming their periodic reviews into a more systematic review and developing a form of report. While smaller NRSROs all have designated compliance officers, the Commission preliminarily believes, based on issues brought to the staff's attention, that some NRSROs may have less robust compliance programs than others NRSRO's. The Commission believes that the information to be included in the proposed report for smaller NRSROs would be less extensive, because smaller NRSRO's may have less complex organizational structures, fewer employees and fewer sources of revenue than larger NRSROs which may be part of a complex global organization with thousands of employees. Therefore, it may be less costly than for larger NRSROs. Finally, the proposed new report under Rule 17g–3 would need to be retained by NRSROs for three years under Rule 17g–2.

The Commission is proposing to amend the Instructions to Exhibit 6 to Form NRSRO to require an applicant/NRSRO to furnish the Commission with information regarding the revenues an NRSRO receives from major clients and from services other than determining credit ratings. In particular, the amendments to Exhibit 6 would require an applicant/NRSRO to provide the following disclosures, as applicable:

- The percentage of the applicant/NRSRO's net revenue attributable to the 20 largest users of credit rating services of the applicant/NRSRO; and
- The percentage of the applicant/NRSRO's revenue attributable to services and products other than credit rating services of the applicant/NRSRO.

In order to comply with the proposed amendments to Exhibit 6 to Form NRSRO, an applicant/NRSRO would need to compile the information in order to complete the additional disclosures. The Commission believes that the burdens imposed by the proposed rule amendments would vary based on the size and complexity of each applicant/NRSRO. The Commission believes that the potential impact of the amendments to Exhibit 6 to Form NRSRO on small NRSROs should not be significant because these entities would have fewer clients and less revenue and therefore lower costs to produce the additional disclosures under the amendments to Exhibit 6 to Form NRSRO.

The Commission is also proposing new Rule 17g–7, which would require an NRSRO to make publicly available on its Internet Web site a consolidated report containing information about the revenues earned by the NRSRO as a result of providing services and products to persons that paid the NRSRO to issue or maintain a credit rating. This report would need to be updated annually. In order to comply with new Rule 17g–7, each NRSRO would need to develop the calculations necessary to generate the percents required under the report; to populate the proposed report with the required data; and to develop and draft the form report. The Commission believes that the burdens imposed by new Rule 17g–7 would vary based on the size and complexity of each applicant/NRSRO. The Commission believes that the potential impact of the proposed Rule 17g–7 on small NRSROs should not be significant because these entities would have fewer clients and less revenue and therefore lower costs to produce the consolidated report required by proposed new Rule 17g–7. The consolidated report would need to be retained for three years in accordance with Rule 17g–2.

F. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no Federal rules that duplicate, overlap, or conflict with the proposed rule amendments and the proposed new rule.

[221] 15 U.S.C. 78a *et seq.*

[222] 15 U.S.C. 78o–7.

[223] 17 CFR 240.0–10(a).

[224] *See* 17 CFR 240.0–10(a). Two of the 10 credit rating agencies currently registered as NRSROs would be considered ''small'' entities for purposes of the Regulatory Flexibility Act. The Commission previously sought comment on the number of small entities that may be affected by other proposed rule amendments to the Commission's NRSRO rules. The Commission received no comments in response to those requests. *See generally, February 2009 Adopting Release*, at 74 FR 6481.

[225] *See* proposed Rule 17g–3(a)(7).

[226] *See* proposed Rule 17g–3(a)(7)(ii).

G. Significant Alternatives

Pursuant to Section 3(a) of the Regulatory Flexibility Act,[227] the Commission must consider certain types of alternatives, including: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission considered whether it is necessary or appropriate to establish different compliance or reporting requirements or timetables; or clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities. Because the proposed rule amendments are designed to improve the overall quality of ratings and enhance the Commission's oversight, the Commission preliminarily believes that small entities should be covered by the rule. The Commission also preliminarily believes that the proposed rule amendments and proposed new rule are flexible and simple enough to allow small NRSROs to comply without the need for the establishment of differing compliance or reporting requirements for small entities.

H. Request for Comments

The Commission encourages written comments on matters discussed in this IRFA. In particular, the Commission seeks comment on the number of small entities that would be affected by the proposed rule amendments and the proposed new rule, and whether the effect on small entities would be economically significant. Commenters are asked to describe the nature of any effect and to provide empirical data to support their views.

XIII. Statutory Authority

The Commission is proposing amendments to Rule 17g–3 and the Instructions to Form NRSRO and new Rule 17g–7, pursuant to the authority conferred by the Exchange Act, including Sections 15E and 17(a).[228]

[227] 5 U.S.C. 603(c).

[228] 15 U.S.C. 78o–7 and 78q.

Text of Proposed Rules

List of Subjects in 17 CFR Parts 240 and 249b

Brokers, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Commission hereby proposes that Title 17, Chapter II of the Code of Federal Regulation be amended as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Section 240.17g–3 is amended by:

a. Adding a new paragraph (a)(7); and

b. Revising paragraph (b).

The additions and revisions read as follows:

§ 240.17g–3 Annual financial reports to be furnished by nationally recognized statistical rating organizations.

(a) * * *

(7)(i) An unaudited report containing a description of the steps taken by the designated compliance officer during the fiscal year to:

(A) Administer the policies and procedures that are required to be established pursuant to paragraphs (g) and (h) of Section 15E of the Exchange Act (15 U.S.C. 78o–7(g) and (h)); and

(B) Ensure compliance with the securities laws and rules and regulations thereunder, including those promulgated by the Commission pursuant to Section 15E of the Exchange Act.

(ii) The report required pursuant to paragraph (a)(7)(i) of this section must include:

(A) A description of any compliance reviews of the activities of the nationally recognized statistical rating organization;

(B) The number of material compliance matters identified during each review of the activities of the nationally recognized statistical rating organization and a brief description of each such matter;

(C) A description of any remediation measures implemented to address material compliance matters identified during the reviews of the activities of the nationally recognized statistical rating organization; and

(D) A description of the persons within the nationally recognized statistical rating organization who were advised of the results of the reviews.

* * * * *

(b) The nationally recognized statistical rating organization must:

(1) Attach to the financial reports furnished pursuant to paragraphs (a)(1) through (a)(6) of this section a signed statement by a duly authorized person associated with the nationally recognized statistical rating organization stating that the person has responsibility for the financial reports and, to the best knowledge of the person, the financial reports fairly present, in all material respects, the financial condition, results of operations, cash flows, revenues, analyst compensation, and credit rating actions of the nationally recognized statistical rating organization for the period presented; and

(2) Attach to the report furnished pursuant to paragraph (a)(7) of this section a signed statement by the designated compliance officer of the nationally recognized statistical rating organization stating that the person has responsibility for the report and, to the best knowledge of the designated compliance officer, the report fairly presents, in all material respects, steps taken by the designated compliance officer for the period presented.

* * * * *

3. Section 240.17g–7 is added to read as follows:

§ 240.17g–7 Reports to be made public by nationally recognized statistical rating organizations about persons that paid the nationally recognized statistical rating organization for the issuance or maintenance of a credit rating.

(a)(1) A nationally recognized statistical rating organization must annually, not later than 90 calendar days after the end of its fiscal year (as indicated on its current Form NRSRO), make publicly available on its Internet Web site a consolidated report that shows, with respect to each person that paid the nationally recognized statistical rating organization to issue or maintain a credit rating that was outstanding as of the end of the fiscal year, the following information:

(i) The percent of the net revenue attributable to the person earned by the nationally recognized statistical rating organization for that fiscal year from providing services and products other than credit rating services to the person, which the nationally recognized statistical rating organization must calculate in accordance with paragraph (a)(3)(i) of this section;

(ii) The relative standing of the person in terms of the person's contribution to the net revenue of the nationally recognized statistical rating organization for the fiscal year, which the nationally recognized statistical rating organization must determine in accordance with paragraph (a)(3)(ii) of this section; and

(iii) All outstanding credit ratings paid for by the person, which the nationally recognized statistical rating organization must determine in accordance with paragraph (a)(3)(iii) of this section.

(2) A nationally recognized statistical rating organization is not required to make publicly available on its Internet Web site the report required by paragraph (a)(1) of this section or include with the publication of a credit rating the statement required by paragraph (b) of this section if, as of the end of the fiscal year, there are no credit ratings outstanding that the nationally recognized statistical rating organization issued or maintained as a result of a person paying the nationally recognized statistical rating organization for the issuance or maintenance of such credit ratings.

(3)(i) The nationally recognized statistical rating organization must calculate the percent of the net revenue attributable to the person earned by the nationally recognized statistical rating organization for the fiscal year from providing services and products other than credit rating services to the person as follows:

(A) Calculate the net revenue attributable to the person earned by the nationally recognized statistical rating organization for the fiscal year from providing services and products other than credit rating services to the person;

(B) Calculate the net revenue attributable to the person earned by the nationally recognized statistical rating organization for the fiscal year from providing all services and products, including credit rating services, to the person; and

(C) Divide the amount calculated pursuant to paragraph (a)(3)(i)(A) of this section by the amount calculated pursuant to paragraph (a)(3)(i)(B) of this section and convert that quotient to a percent.

(ii) The nationally recognized statistical rating organization must determine the relative standing of the person in terms of the person's contribution to the net revenue of the nationally recognized statistical rating organization for the fiscal year as follows:

(A) For each person from whom the nationally recognized statistical rating organization earned net revenue during the fiscal year, calculate the net revenue attributable to the person earned by the nationally recognized statistical rating organization for the fiscal year from providing all services and products, including credit rating services, to the person;

(B) Make a list that sorts the persons subject to the calculation in paragraph (a)(3)(ii)(A) of this section in order from largest to smallest in terms of the amount of net revenue attributable to the person, as determined pursuant to that paragraph; and

(C) Divide the list generated pursuant to paragraph (a)(3)(ii)(B) of this section into the following categories: Top 10%, top 25%, top 50%, bottom 50%, and bottom 25% and determine which category contains the person.

(iii) Identify by name of obligor, security, or money market instrument and, as applicable, CIK number, CUSIP, or ISIN each outstanding credit rating generated as a result of the person paying the nationally recognized statistical rating organization for the issuance or maintenance of the credit rating and attribute the outstanding credit rating to the person.

(b) A nationally recognized statistical rating organization must prominently include the following statement indicating where on its Internet Web site the consolidated report required pursuant to paragraph (a)(1) of this section is located each time the nationally recognized statistical rating organization publishes a credit rating or credit ratings in a research report, press release, announcement, database, Internet Web site page, compendium, or any other written communication that makes the credit rating publicly available for free or a reasonable fee: ''Revenue information about persons that paid the nationally statistical rating organization for the issuance or maintenance of a credit rating is available at: [insert address to Internet Web site].''

(c) For purposes of this section:

(1) The term *credit rating services* means any of the following: Rating an obligor (regardless of whether the obligor or any other person paid for the credit rating); rating an issuer's securities or money market instruments (regardless of whether the issuer, underwriter, or any other person paid for the credit rating); and providing credit ratings, credit ratings data, or credit ratings analysis to a subscriber.

(2) The term *net revenue* means revenue earned for any type of service or product provided to a person, regardless of whether related to credit rating services, and net of any rebates and allowances paid or owed to the person.

PART 249b—FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for part 249b continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.,* unless otherwise noted;

* * * * *

§ 249b.300 [Amended]

5. Form NRSRO (referenced in § 249b.300) is amended by revising Exhibit 6 in Item 9 to read as follows:

Note: The text of Form NRSRO does not and this amendment will not appear in the Code of Federal Regulations.

Form NRSRO

* * * * *

9. Exhibits * * *

* * * * *

Exhibit 6. Information concerning conflicts of interest or potential conflicts of interest relating to the issuance of credit ratings by the credit rating agency.

☐ Exhibit 6 is attached to and made a part of this Form NRSRO.

* * * * *

6. Amend Form NRSRO Instructions (referenced in § 249b.300) by:

a. Revising Instruction A.8.;

b. Adding a Note to the end of Instruction F;

c. Removing the words ''withdrawal of registration'' and adding in their place the words ''withdrawal from registration'' in the first sentence of Instruction H, Item 5;

d. Revising Exhibit 6 in Instruction H, Item 9;

e. Removing the words ''(See definition below)'' from the first sentence of Exhibit 8 in Instruction H, Item 9;

f. Removing the word ''person'' and adding in its place the words ''user of credit rating services'' in the first sentence in Exhibit 10, Instruction H, Item 9, and removing the fifth sentence in Exhibit 10, Instruction H, Item 9, which includes the definitions of ''net revenue'' and ''credit rating services'';

g. Redesignating Instruction F as Instruction I; and

h. Revising newly redesignated Instruction I.

The revisions and addition read as follows:

Note: The text of Form NRSRO does not and this amendment will not appear in the Code of Federal Regulations.

FORM NRSRO INSTRUCTIONS

* * * * *

A. GENERAL INSTRUCTIONS

* * * * *

8. ADDRESS—The mailing address for Form NRSRO is: Division of Trading and Markets, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–7010.

* * * * *

F. INSTRUCTIONS FOR ANNUAL CERTIFICATIONS

* * * * *

Note to Instruction F: The annual financial reports that an NRSRO must furnish to the Commission pursuant to Section 15E(k) of the Exchange Act and Exchange Act Rules 17g–3(a)(1) through (a)(6), as applicable, should not be furnished as part of the Annual Certification on Form NRSRO. If the fiscal year end of the NRSRO is December 31, however, the financial reports may be furnished in the same mailing as the Annual Certification. In accordance with Exchange Act Rule 17g–3(b), the NRSRO must attach to *each* report the certification required by the Rule.

* * * * *

H. INSTRUCTIONS FOR SPECIFIC LINE ITEMS

* * * * *

Item 9. Exhibits. * * *

* * * * *

Exhibit 6. Provide in this Exhibit information concerning conflicts of interest or potential conflicts of interest relating to the issuance of credit ratings by the Applicant/NRSRO.

Part A. Identify the types of conflicts of interest relating to the issuance of credit ratings by the Applicant/NRSRO that are material to the Applicant/NRSRO. First, identify the conflicts described in the list below that apply to the Applicant/NRSRO. The Applicant/NRSRO may use the descriptions below to identify an applicable conflict of interest and is not required to provide any further details. Second, briefly describe any other type of conflict of interest relating to the issuance of credit ratings by the Applicant/NRSRO that is not covered in the descriptions below that is material to the Applicant/NRSRO (for example, one the Applicant/NRSRO has established specific policies and procedures to address):

- The Applicant/NRSRO is paid by issuers or underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite.
- The Applicant/NRSRO is paid by obligors to determine credit ratings of the obligors.
- The Applicant/NRSRO is paid for services in addition to determining credit ratings by issuers, underwriters, or obligors that have paid the Applicant/NRSRO to determine a credit rating.
- The Applicant/NRSRO is paid by persons for subscriptions to receive or access the credit ratings of the Applicant/NRSRO and/or for other services offered by the Applicant/NRSRO where such persons may use the credit ratings of the Applicant/NRSRO to comply with, and obtain benefits or relief under, statutes and regulations using the term ''nationally recognized statistical rating organization.''
- The Applicant/NRSRO is paid by persons for subscriptions to receive or access the credit ratings of the Applicant/NRSRO and/or for other services offered by the Applicant/NRSRO where such persons also may own investments or have entered into transactions that could be favorably or adversely impacted by a credit rating issued by the Applicant/NRSRO.
- The Applicant/NRSRO allows persons within the Applicant/NRSRO to:
  - Directly own securities or money market instruments of, or have other direct ownership interests in, obligors or issuers subject to a credit rating determined by the Applicant/NRSRO.
  - Have business relationships that are more than arm's length ordinary course business relationships with obligors or issuers subject to a credit rating determined by the Applicant/NRSRO.
- A person associated with the Applicant/NRSRO is a broker or dealer engaged in the business of underwriting securities or money market instruments (identify the person).
- The Applicant/NRSRO has any other material conflict of interest that arises from the issuances of credit ratings (briefly describe).

Part B. Provide the following information concerning revenues of the Applicant/NRSRO. An Applicant must provide this information for the fiscal year ending immediately before the date of the Applicant's initial application to the Commission. An NRSRO with a fiscal year end of December 31 must provide this information as part of its Annual Certification. Otherwise, an NRSRO must provide this information with an Update of Registration not later than 90 days after the end of each fiscal year.

(1) Provide the percentage of total net revenue attributable to the 20 largest users of credit rating services of the Applicant/NRSRO by dividing:

- The total amount of net revenue earned by the Applicant/NRSRO attributable to the 20 largest users of credit rating services of the Applicant/NRSRO; by
- The total amount of the four classifications of revenue of the Applicant as reported in Exhibit 12 to Form NRSRO or the NRSRO as reported in the financial report furnished to the Commission under Exchange Act Rule 17g–3(a)(4).

Note to Part B(1) of Exhibit 6: The 20 largest users of credit rating services includes issuers, subscribers, obligors, and underwriters, and may not be the same as the list of 20 largest issuers and subscribers identified by the Applicant in Exhibit 10 to Form NRSRO or by the NRSRO in the financial report furnished to the Commission under Exchange Act Rule 17g–3(a)(5).

(2) Provide the percentage of total net revenue attributable to other services and products of the Applicant/NRSRO by dividing:

- The total amount of revenue earned by the Applicant/NRSRO for ''all other services and products'' of the Applicant as reported in Exhibit 12 to Form NRSRO or of the NRSRO as reported in the financial report furnished to the Commission under Exchange Act Rule 17g–3(a)(4); by
- The total amount of the four classifications of revenue of the Applicant as reported in Exhibit 12 to Form NRSRO or of the NRSRO as reported in the financial report furnished to the Commission under Exchange Act Rule 17g–3(a)(4).

* * * * *

Exhibit 10. Provide in this Exhibit a list of the largest users of credit rating services of the Applicant by the amount of net revenue earned by the Applicant attributable to the user of credit rating services during the fiscal year ending immediately before the date of the initial application. First, determine and list the 20 largest *issuers* and *subscribers* in terms of net revenue. Next, add to the list any *obligor* or *underwriter* that, in terms of net revenue during the fiscal year, equaled or exceeded the 20th largest issuer or subscriber. In making the list, rank the persons in terms of net revenue from largest to smallest and include the net revenue amount for each person.

An NRSRO is not required to make this Exhibit publicly available on its Web site, or through another comparable, readily accessible means pursuant to Exchange Act Rule 17g–1(i). An NRSRO may request that the Commission keep this Exhibit confidential by marking each page ''Confidential Treatment'' and complying with Commission rules governing confidential treatment (*See* 17 CFR 200.80 and 17 CFR 200.83). The Commission will keep the information and documents in the Exhibit

confidential upon request to the extent permitted by law.

* * * * *

I. EXPLANATION OF TERMS

1. COMMISSION—The U.S. Securities and Exchange Commission.

2. CREDIT RATING [Section 3(a)(60) of the Exchange Act]—An assessment of the creditworthiness of an obligor as an entity or with respect to specific securities or money market instruments.

3. CREDIT RATING AGENCY [Section 3(a)(61) of the Exchange Act]—Any person:

- Engaged in the business of issuing credit ratings on the Internet or through another readily accessible means, for free or for a reasonable fee, but does not include a commercial credit reporting company;
- Employing either a quantitative or qualitative model, or both to determine credit ratings; and
- Receiving fees from either issuers, investors, other market participants, or a combination thereof.

4. CREDIT RATING SERVICES—Any of the following services:

- Rating an obligor (regardless of whether the obligor or any other person paid for the credit rating);
- Rating an issuer's securities or money market instruments (regardless of whether the issuer, underwriter, or any other person paid for the credit rating); and
- Providing credit ratings, credit ratings data, or credit ratings analysis to a subscriber.

5. NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION [Section 3(a)(62) of the Exchange Act]—A credit rating agency that:

- Has been in business as a credit rating agency for at least the 3 consecutive years immediately preceding the date of its application for registration as an NRSRO;
- Issues credit ratings certified by qualified institutional buyers in accordance with Section 15(a)(1)(B)(ix) of the Exchange Act with respect to:
  - Financial institutions, brokers, or dealers;
  - Insurance companies;
  - Corporate issuers;
  - Issuers of asset-backed securities;
  - Issuers of government securities, municipal securities, or securities issued by a foreign government; or
  - A combination of one or more of the above; and
- Is registered as an NRSRO.

6. NET REVENUE—revenue earned by the Applicant/NRSRO for any type of service or product provided to a person, regardless of whether related to credit rating services, and net of any rebates and allowances the Applicant/NRSRO paid or owes to the person.

7. PERSON—An individual, partnership, corporation, trust, company, limited liability company, or other organization (including a separately identifiable department or division).

8. PERSON WITHIN AN APPLICANT/NRSRO—The person furnishing Form NRSRO identified in Item 1, any credit rating affiliates identified in Item 3, and any partner, officer, director, branch manager, or employee of the person or the credit rating affiliates (or any person occupying a similar status or performing similar functions).

9. SEPARATELY IDENTIFIABLE DEPARTMENT OR DIVISION—A unit of a corporation or company:

- That is under the direct supervision of an officer or officers designated by the board of directors of the corporation as responsible for the day-to-day conduct of the corporation's credit rating activities for one or more affiliates, including the supervision of all employees engaged in the performance of such activities; and
- For which all of the records relating to its credit rating activities are separately created or maintained in or extractable from such unit's own facilities or the facilities of the corporation, and such records are so maintained or otherwise accessible as to permit independent examination and enforcement by the Commission of the Exchange Act and rules and regulations promulgated thereunder.

10. QUALIFIED INSTITUTIONAL BUYER [Section 3(a)(64) of the Exchange Act]—An entity listed in 17 CFR 230.144A(a) that is not affiliated with the credit rating agency.

* * * * *

By the Commission.

Dated: November 23, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–28497 Filed 12–3–09; 8:45 am]

BILLING CODE 8011–01–P

Federal Register

Friday,

December 4, 2009

Part III

Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 192

Pipeline Safety: Integrity Management Program for Gas Distribution Pipelines; Final Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 192

[Docket No. PHMSA–RSPA–2004–19854; Amdt. 192–113]

RIN 2137–AE15

Pipeline Safety: Integrity Management Program for Gas Distribution Pipelines

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Final rule.

SUMMARY: PHMSA is amending the Federal Pipeline Safety Regulations to require operators of gas distribution pipelines to develop and implement integrity management (IM) programs. The purpose of these programs is to enhance safety by identifying and reducing pipeline integrity risks. The IM programs required by this rule are similar to those required for gas transmission pipelines, but tailored to reflect the differences in and among distribution pipelines. Based on the required risk assessments and enhanced controls, the rule also allows for risk-based adjustment of prescribed intervals for leak detection surveys and other fixed-interval requirements in the agency's existing regulations for gas distribution pipelines. To further minimize regulatory burdens, the rule establishes simpler requirements for master meter and small liquefied petroleum gas (LPG) operators, reflecting the relatively lower risk of these small pipelines.

In accordance with Federal law, the rule also requires operators to install excess flow valves on new and replaced residential service lines, subject to feasibility criteria outlined in the rule.

This final rule addresses statutory mandates and recommendations from the DOT's Office of the Inspector General (OIG) and stakeholder groups.

DATES: *Effective Date:* This Final Rule takes effect February 2, 2010.

Comment Date: Interested persons are invited to submit comment on the provisions for reporting failures of compression couplings by January 4, 2010. At the end of the comment period, we will publish a document modifying these provisions or a document stating that the provisions will remain unchanged.

ADDRESSES: Comments limited to the provisions on reporting failures of mechanical couplings should reference Docket No. PHMSA–RSPA–2004–19854 and may be submitted in the following ways:

- *E-Gov Web site: http://www.regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* DOT Docket Operations Facility (M–30), U.S. Department of Transportation, West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* DOT Docket Operations Facility, U.S. Department of Transportation, West Building, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: In the E-Gov Web site: *http://www.regulations.gov,* under ''Search Documents'' select ''Pipeline and Hazardous Materials Safety Administration.'' Next, select ''Notices,'' and then click ''Submit.'' Select this rulemaking by clicking on the docket number listed above. Submit your comment by clicking the yellow bubble in the right column then following the instructions.

Identify docket number PHMSA–RSPA–2004–19854 at the beginning of your comments. For comments by mail, please provide two copies. To receive PHMSA's confirmation receipt, include a self-addressed stamped postcard. Internet users may access all comments at *http://www.regulations.gov,* by following the steps above.

Note: PHMSA will post all comments without changes or edits to *http://www.regulations.gov* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mike Israni by phone at (202) 366–4571 or by e-mail at *Mike.Israni@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Existing integrity management regulations cover operators of hazardous liquid pipelines (49 CFR 195.452, published at 65 FR 75378 and 67 FR 2136) and gas transmission pipelines (49 CFR 192, Subpart O, published at 68 FR 69778). These regulations require that operators of these pipelines develop and follow individualized integrity management (IM) programs, in addition to PHMSA's core pipeline safety regulations. The IM approach was designed to promote continuous improvement in pipeline safety by requiring operators to identify and invest in risk control measures beyond core regulatory requirements.

PHMSA published a Notice of Proposed Rulemaking (NPRM) on June 25, 2008, (73 FR 36015) to extend its integrity management approach to the largest segment of the Nation's pipeline network—the gas distribution pipelines that directly serve homes, schools, businesses, and other natural gas consumers. Significant differences between gas distribution pipelines and gas transmission or hazardous liquid pipelines made it impractical to apply the existing regulations to distribution pipelines. The proposed rule incorporated the same basic principles as current integrity management regulations but with a slightly different approach to accommodate those differences. PHMSA worked with a number of multi-stakeholder groups to help determine the best way to apply integrity management principles to distribution pipelines before publishing the NPRM. The work and conclusions of the stakeholder groups are described in the NPRM.

As described in the NPRM, the proposal was responsive to recommendations from DOT's Inspector General and the National Transportation Safety Board. It also proposed to implement a requirement in the Pipeline Inspection, Protection, Enforcement and Safety Act (PIPES Act) of 2006 that integrity management requirements be established for distribution pipelines.

The proposed rule also included a provision to allow distribution pipeline operators to apply for approval from their safety regulators to adjust the intervals at which they perform specific safety requirements that current regulations require to be performed at specified intervals. This provision recognized the basic principle underlying integrity management—that operators should identify and understand the threats to their pipelines and apply their safety resources commensurate with the importance of each threat. Operators devote resources to comply with the core pipeline safety regulations. These safety resources can be made available for other purposes where a low level of risk makes a longer interval acceptable. Applying those resources to other safety tasks to address higher risks can result in an overall improvement in safety.

In addition, the proposed rule would have required distribution pipeline operators to install excess flow valves (EFV) in certain new and replaced residential service lines. This provision also implemented a requirement in the 2006 PIPES Act.

II. Comments on the NPRM

PHMSA received 143 letters commenting on the proposed rule. Of these:

- 12 were from associations. This includes national and regional associations of gas distribution pipeline operators and the National Association of Pipeline Safety Representatives (NAPSR), the Association of State Pipeline Safety Regulators.
- 62 were from municipal distribution pipeline operators.
- 45 were from non-municipal local distribution pipeline operators.
- 15 were from State pipeline safety agencies.
- 5 were from companies supplying products and services to the industry.
- 1 was from a citizens' group.
- 1 was from the Plastic Pipe Database Committee (PPDC).
- 1 was from the Gas Piping Technology Committee (GPTC).
- 1 was from an anonymous commenter.

General Comments

Virtually all comment letters supported the proposed rule, with notable exceptions for some of its provisions. The vast majority of commenters commended PHMSA for the inclusive way in which the background for the proposed rule was developed. Most commenters who took exception to particular provisions in the proposed rule objected to those provisions as being beyond what stakeholder groups had suggested.

The anonymous commenter suggested that the proposed rule is not needed and noted that accidents happen. One operator suggested that this entire proposal is unnecessary, since existing rules are adequate to assure safety. One operator also opposed the proposed rule, noting that system differences mean that the concepts used on transmission lines do not apply to distribution and suggesting that the burden of implementing integrity management for distribution pipelines would cause more harm than good. One state pipeline safety regulatory agency also opposed the proposed rule, noting that the existing body of regulations has resulted in a very low number of deaths annually from distribution pipeline accidents and suggesting that the new requirements would therefore not be cost-beneficial. The State agency also noted that the new rule will impose additional work on already-burdened State pipeline safety regulators.

PHMSA has considered these comments but still considers it necessary to issue a rule requiring integrity management for distribution pipelines. While accidents may continue to occur, that does not mean that reasonable actions should not be taken to avoid those accidents that could be prevented. PHMSA concludes that the flexibility inherent in the rule, as modified in response to other comments (described below), adequately addresses concerns based on differences among distribution pipelines. PHMSA also concludes that the changes made in response to other comments will reduce implementation costs and that the rule will be cost-beneficial. PHMSA is working with State pipeline safety agencies to increase the level of Federal financial support provided for State programs. PHMSA notes that the vast majority of distribution pipeline operators and State regulators, and the associations that represent them, supported the proposed rule. The existing rules help assure an admirable safety level. Still, significant accidents continue to occur, if infrequently. Experience has shown that incidents are most often caused by a combination of circumstances. These circumstances represent risks for the pipeline involved, but may not affect other pipelines. It is thus not practical to create additional prescriptive requirements to address these pipeline-specific risks. This rule (as the integrity management requirements for other types of pipelines that preceded it) requires that operators evaluate their pipelines to identify the risks important to their circumstances and take appropriate actions to address those risks.

This IM regulation for distribution operators requires an operator to conduct a comprehensive evaluation of its system to better identify threats to the system, to implement additional measures to help prevent accidents from occurring and to mitigate the consequences if an accident does occur. IM provides for a more systematic and comprehensive approach to preventing failures. Accordingly, PHMSA considers this the most effective means to effect further reductions in the number of pipeline incidents. The regulatory analysis supporting this rule considers the improvement in safety that is expected to result and explicitly recognizes the current low frequency of serious accidents.

Specific Comments

There was a broad consensus among commenters that several provisions in the proposed rule should be deleted or significantly modified. In most cases, the consensus included parties from ''commercial'' and municipal operators (and their associations) and State regulators. Many additional comments were made, often suggesting specific changes needed to improve the proposed rule or to make clear the actions required to comply. These comment topics are:

Comment Topic 1 Plastic Pipe Reporting.
Comment Topic 2 Performance Through People.
Comment Topic 3 ''Damage'' Definition.
Comment Topic 4 Implementation Time.
Comment Topic 5 Rule Structure and Implementation.
Comment Topic 6 Alternative Intervals.
Comment Topic 7 IM Requirements for Master Meter and LPG Operators.
Comment Topic 8 Transmission Lines Operated by Distribution Operators.
Comment Topic 9 Part 192—Requirement References.
Comment Topic 10 Hazardous Leak Definition.
Comment Topic 11 Required Documentation.
Comment Topic 12 Excess flow valves.
Comment Topic 13 Guidance.
Comment Topic 14 Leak monitoring.
Comment Topic 15 State authority.
Comment Topic 16 IM program evaluation and improvement.
Comment Topic 17 Permanent marking of plastic pipe.
Comment Topic 18 Continuing surveillance.
Comment Topic 19 Information gathering.
Comment Topic 20 Knowledge of pipeline.
Comment Topic 21 Threat identification.
Comment Topic 22 Risk assessments.
Comment Topic 23 Performance measures.
Comment Topic 24 Regulatory analysis.
Comment Topic 25 IM for new pipelines.
Comment Topic 26 Annual report form.

A discussion of each comment topic and PHMSA's response to each follows:

Comment Topic 1: Plastic pipe reporting.

Commenters universally rejected the proposal to require reporting of all plastic pipe failures. Commenters noted that the plastic pipe data committee (PPDC) includes representatives of all stakeholder groups and has several years of data for identifying trends that would be lost if PPDC were no longer used. Commenters believe PPDC has done an excellent job of collecting and analyzing operating experience with plastic pipe. According to commenters, operators of approximately 75 percent of installed plastic pipe mileage voluntarily provide information to PPDC. While this is less than the 100 percent participation that would result from a mandatory reporting requirement, commenters maintained this is sufficient data to draw statistically significant conclusions about the performance of all plastic pipe.

Many commenters thought PHMSA's concern that information from PPDC is

not available to the entire industry is unjustified. These commenters noted that PPDC issues summary reports, that trade associations (who participate in PPDC) provide information to their members, and that PHMSA has issued advisory bulletins concerning significant PPDC conclusions. Many operators commented that they would not have the time or resources to review detailed failure information on their own, and that the information currently provided by the trade associations and PHMSA advisories is useful to them.

Some commenters suggested that the rule require operators to make use of this information. AGA and one operator suggested that the requirement to report plastic pipe failures be replaced with a requirement that operators consider industry and government advisories in evaluating plastic pipe performance as part of their DIMP programs. They believe this would be more effective in addressing PHMSA's underlying concern of operators not considering relevant information than would mandatory reporting. All who addressed this subject agreed that replacing the current system with mandatory reporting of all failures would be unreasonably burdensome and would not improve knowledge or safety. PPDC commented that mandatory reporting is not needed as they have the necessary structure and participation. PPDC suggested that it would take years to collect enough data to duplicate the information they already have on hand.

PHMSA response: PHMSA is persuaded that the data collection burden is not warranted at this time given the current system of PPDC analysis of plastic pipe failure trends and dissemination of lessons learned from this analysis via PPDC reports and trade association communications and through our advisories. The final rule does not include the requirement to report all plastic pipe failures.

The proposed requirement included reporting failures of couplings used with plastic pipe. PHMSA has retained this requirement for compression couplings. This final rule includes a requirement that operators report failures of compression coupling as part of their annual reports. This provision was an included part of proposed § 192.1009, which would have required reporting of ''each material failure of plastic pipe (including fittings, *couplings,* valves and joints)'' (emphasis added). As described above, PHMSA has deleted from the final rule the requirement to report plastic pipe failures, since it was persuaded by the public comments that PPDC is adequately collecting and analyzing this data and disseminating the results of its analysis broadly. PPDC does not, however, collect data on couplings used to join plastic pipe, since the body of most couplings is metal. Coupling failure has been the cause of a number of incidents on distribution pipelines in recent years and the subject of several PHMSA advisories. Additional data concerning coupling failures is needed to enable PHMSA to determine if additional requirements are needed to help prevent future incidents from coupling failure. Accordingly, PHMSA has retained the included element of reporting of coupling failures in this final rule.

The final rule provision is not limited to couplings used on plastic pipe. PHMSA understands that the principal use for couplings in distribution pipeline systems is to connect plastic pipe or to connect plastic pipe to metal pipe (including risers, etc.). PHMSA recognizes that it is possible for mechanical couplings to be used to connect metal pipe to metal pipe, and that reporting of failures involving such connections would not have been encompassed by the proposed requirements related to plastic pipe in the NPRM. PHMSA believes that use of couplings in applications that do not involve plastic pipe is rare. Nevertheless, PHMSA invites public comment on the extension of this proposed requirement to include reporting of failure of couplings used in metal pipe. Comments should be submitted by January 4, 2010. Based on the comments we receive, we will consider modifying the provision. At the end of the comment period, we will either issue a modification or a notice stating that the section stands as written.

An operator is not required to collect coupling failure information until January 1, 2010. We expect to issue any modifications to this section prior to that date. If we are delayed in issuing a modification, we will then consider further delaying the compliance date for section 192.1009. PHMSA is issuing, in conjunction with this final rule, a 60-day notice regarding amendments to the Annual Report form, which includes changes related to this reporting requirement. Until PHMSA announces a modification, operators should plan to report the information described in the 60-day notice.

Comment Topic 2: Performance through people.

Commenters opposed the performance through people (PTP) element and the proposed requirement that each IM plan include a section entitled ''Assuring Individual Performance.'' Commenters maintained that the proposed requirement is vague and likely unenforceable and that it creates confusion and diminishes the focus on the core issues of importance to IM. They pointed out, as did PHMSA in the NPRM's preamble, that other regulations currently address the impact of people on pipeline safety. These regulations include Operator Qualification, Drug and Alcohol requirements, Damage Prevention, and Public Awareness. Commenters noted that the proposed PTP requirement is unclear about what, if any, additional actions are expected, and that having to refer to actions taken under these other requirements in an IM plan creates an unnecessary additional paperwork burden. NAPSR, American Public Gas Association (APGA), GPTC, and operators suggested that PHMSA should not presume that action is required by all operators to address the threat of inappropriate operation. These commenters noted that studies, including those conducted by the American Gas Foundation (AGF) and Allegro and referred to in the preamble of the NPRM, have shown that this threat poses a very small risk; PHMSA data shows it to be the cause of only 3% of all leaks.

PHMSA response: PHMSA has not included PTP requirements in the final rule. PHMSA agrees the provision is largely duplicative of other existing regulations. Nevertheless, the final rule still requires that operators evaluate all threats applicable to their pipeline systems. Thus, operators for which inappropriate operation is a threat of concern will be required to address that threat.

Comment Topic 3: ''Damage'' definition.

In the NPRM, PHMSA proposed to add a new definition for ''damage'' applicable to the IM subpart. The proposed definition was ''any impact or exposure resulting in the repair or replacement of an underground facility, related appurtenance, or materials supporting the pipeline.'' This term is being defined because of a provision in the proposed rule that would require reporting the number of excavation ''damages'' as a performance measure. Industry stakeholders universally commented that the definition of ''damage'' should be limited to excavation damage and to damage that causes loss of gas (immediate leaks). GPTC would further limit the definition to ''known'' excavation damage. States and NAPSR suggested defining excavation damage vs. damage, but did not suggest limiting damage of interest to damage causing leaks. One operator

suggested that the definition should also include instances in which damaged pipe is retired in place because damaged pipe and appurtenances are not always repaired or removed; the operator suggested that the definition should focus on the unplanned nature of the repair, removal or retirement.

The commenters pointed out that operators report data regarding leaks in their annual reports but not other damage. Operators are not now required to collect data on damages that do not result in leaks. Commenters contended that extending the definition of damage to encompass situations that do not cause leaks will cause loss of continuity with previous data and may cause confusion. Some noted that statistically better conclusions can be drawn if such continuity is maintained. Some commenters asked whether coating damage or damage to anodes/test wires would be included. Others noted that discovery of latent damage, that may have occurred years earlier, is not a measure of the current effectiveness of a damage prevention or integrity management program. Industry expressed concern about the additional recordkeeping burden associated with capturing data on non-leak damages.

Two operators suggested that the term ''exposure'' be eliminated from the proposed definition of damage (or excavation damage) because it is unclear what this term adds. They question, for example, whether washouts would be included.

PHMSA response: PHMSA agrees that excavation damage is of principal concern and is the term that should be defined. PHMSA does not agree, however, that only excavation damage that results in a leak is of concern.

Mitigating the threat of excavation damage means implementing or continuing actions that will minimize the likelihood that excavation near the pipeline will cause damage. Operators must seek to prevent excavation ''hits'' of the pipeline, whether a hit results in leakage or not (*e.g.,* a glancing blow or insufficient force to cause a leak). That a hit occurs, regardless of whether it causes leakage, is an indication that the actions intended to prevent such an occurrence have failed. Operators cannot adequately evaluate the effectiveness of their mitigative actions for this threat, and PHMSA cannot evaluate the effectiveness of these actions on a national level, if non-leak events are excluded. Assuring continuity with past data is less important than assuring that the data being collected appropriately addresses the event of concern.

At the same time, PHMSA is sympathetic to the need to have well-defined criteria identifying what damage is to be included in performance monitoring and understands that a definition based on whether a leak occurred would provide clarity; however, it would not allow operators and PHMSA to monitor the effectiveness of damage prevention measures.

Pipeline operators, as well as operators of all underground facilities, need to evaluate the effectiveness of damage prevention efforts. The Common Ground Alliance (CGA) is a national group involving operators of all types of underground facilities, as well as representatives of excavators and others who play a part in preventing damage to underground facilities. CGA has established the Damage Information Reporting Tool (DIRT) to collect information submitted voluntarily concerning damage to underground facilities. Some pipeline operators participate in DIRT. DIRT defines damage based on whether repair or replacement of an underground facility is required. This is very similar to the definition proposed in the NPRM, which also relied on the need to repair or replace as the defining criterion. PHMSA has modified the definition in the final rule to match more closely the language used in the DIRT definition of excavation damage. PHMSA has omitted the phrase ''of exposure'' used in the DIRT definition, since this refers to damage from causes other than excavation (*e.g.,* washout). The changes in the definition in the final rule will provide the needed clarity and will also facilitate potential comparison of distribution pipeline damage prevention performance to that of other underground facilities for which CGA collects data. This change also obviates the need to include retirement in the definition because retirement of an active pipeline will usually involve replacement or bypass. Damage to the protective coating or to the cathodic protection that requires repair/replacement is damage of concern in evaluating the effectiveness of damage prevention measures; therefore, the definition in the final rule clarifies that damage necessitating repair to coating or to cathodic protection constitutes excavation damage.

Comment Topic 4: Implementation time.

Many industry commenters objected to the requirement that IM plans be ''fully implemented'' within 18 months. They suggested that ''fully'' be deleted. IM plans inherently involve learning more about the pipeline systems and associated risks, and it is not clear when they will be ''fully'' implemented.

A few operators suggested we clarify what is meant by ''implement.'' They noted that it was not clear if this meant that all databases must be fully populated and that, if so, it cannot be accomplished in 18 months. Many industry commenters also objected to the proposed requirement that implementation occur within 18 months. They argued that many operators will need to make changes in how they collect and manage data, including the need to purchase new computers and develop new databases or make other IT changes, and that these changes take time. Industry also suggested that it is not practical to expect that plans will be implemented, databases will be fully populated, etc., for all portions of complex distribution systems in a short period of time. AGA noted that Congress allowed 10 years for full implementation of gas transmission IM. Commenters varied in their suggestions for a different implementation deadline. Many suggested 24 months, with one operator clarifying that after such a period operators should be required to have developed and implemented a ''framework'' that will further develop over time. One operator suggested one year to develop plans/programs and another year to implement. Others suggested variations on this approach, with 1½ years allowed either for development or implementation.

One operator commented that the proposed rule was too ambiguous as to the actions required to implement its provisions. It stated that the rule lacks the clarity needed to know what must be done.

PHMSA response: PHMSA has deleted the term ''fully'' from the final rule. PHMSA has retained the 18-month requirement. PHMSA recognizes that implementing IM plans involves learning and revision but does not agree that this means it is necessary to stretch out the implementation deadline. It is important to implement—to begin the iterative learning process—as soon as practical. With ''fully'' being deleted, as noted above, it is clear that implementation is not expected to mean that all problems have been identified and resolved. PHMSA notes that 18 months is consistent with the period suggested by many commenters for developing IM programs and, with deletion of the concept of ''fully implement,'' believes this period is still appropriate.

AGA's comment is incorrect. Congress allowed 10 years for gas transmission operators to complete baseline

assessments (*i.e.,* physical inspection) of the portions of their pipelines in high consequence areas.[1] The proposed rule did not include a provision for distribution pipeline operators to conduct such assessments. Transmission pipeline operators were required to develop and implement IM plans in one year.[2]

PHMSA disagrees with the comment that the rule is ambiguous. This comment was not echoed by the many other operators or the trade associations that submitted comments. Some commenters identified specific areas where they believed further clarity was needed and PHMSA has made changes where appropriate, as described below. As a result, PHMSA concludes that the actions required to implement the final rule are clear.

Comment Topic 5: Rule structure and implementation.

Several commenters addressed specific issues associated with the structure of the rule and language in proposed § 192.1005 addressing what gas distribution operators must do to implement this new subpart. A consultant and GPTC both suggested that section headers within the rule not be written as questions because questions are inherently longer than classic titles, and make the rule harder to use.

AGA and several distribution operators objected to the proposed requirement that procedures describe the ''processes'' for developing, implementing and periodically improving IM elements. The Iowa Utilities Board (Iowa) also suggested that this provision be modified to remove the reference to processes. The commenters noted that the term is unclear and could be interpreted to require elaborate algorithms. They noted that the stakeholders concluded that major technical changes are not needed, which they interpret to mean that major ''processes'' are not required to implement distribution IM. They believe that deleting the term does not affect the meaning of the proposed requirement.

PHMSA response: The structure of the regulation as question and answer is part of the long-standing Government-wide requirement to write regulations in ''plain English.'' PHMSA has been consistently using this format in its pipeline rulemakings for some time. PHMSA has revised § 192.1005(b) to delete the reference to ''processes.''

Comment Topic 6: Alternative intervals.

Commenters generally favored the proposed requirement that would allow operators to propose alternative intervals for part 192 requirements. There were a number of comments related to this provision and its implementation.

a. Concept.

AGA, GPTC, and many gas distribution operators supported the proposal. They noted that shifting of resources often is necessary to assure safety efficiently. They believe that the proposed rule would not be cost-beneficial unless it allowed for such adjustments. They noted that risk-based intervals are more effective and efficient and can result in improved safety and reduced costs. In response to a preamble question concerning advantages and disadvantages of allowing operators to adjust required intervals, some operators commented that the engineering work needed to establish new intervals and the need for State review and understanding of the basis were disadvantages of PHMSA's proposal.

PHMSA response: This provision is intended to facilitate realignment of safety resources, where appropriate, to promote efficiency without compromising safety. Because operators are in the best position to understand the risks on their system, and where resources should be effectively applied, this provision is designed to give operators that latitude to effectively manage their systems. Approval from regulators is necessary to prevent the abuse of this provision. Operators are not required to apply for adjusted intervals. If the burden of engineering work and seeking State review are too burdensome, the operator may continue to use the intervals in the regulations.

b. Process.

AGA, GPTC, and several operators suggested that it will be important for PHMSA to provide guidance to the States for implementing alternative intervals. One operator suggested a federal ''template'' to be used by the States. Commenters suggested that consistency would be particularly important for large companies that operate pipelines in multiple states. One commenter stated the process should be ''streamlined.'' NAPSR, however, asserted that approval should be per State procedures, with flexibility provided for each State to consider its particular circumstances. Iowa also noted that such guidance is not needed.

The Massachusetts Department of Public Utilities suggested that a process needs to be defined for appeal of decisions related to proposals for alternative intervals. They believe that such a process should be consistent with that for waivers under 49 U.S.C. 60118.

PHMSA response: State authority and regulatory structures differ, and some state regulators may need to seek additional authority (from their state government) to implement this provision. States will implement this provision under individual state statutory authority in accordance with the applicable certification under 49 U.S.C. 60105 of this title or agreement under section 60106. PHMSA believes most states will be able to establish procedures under existing authority and may already have procedures that can be used for this purpose.

PHMSA agrees with NAPSR that states need flexibility in implementing this provision. PHMSA will develop criteria for evaluating operator's alternative interval proposal in the states where PHMSA exercises enforcement authority over distribution pipelines. States may be able to use those criteria where they exercise enforcement authority. Factors important to each regulatory authority's consideration of proposed changes to intervals for safety actions are also likely to differ. These differences make it impractical to develop a common ''template'' process.

PHMSA agrees that the regulatory authority responsible for reviewing the request should institute appropriate administrative procedures for processing requests for alternative intervals, to include a process for appealing a decision. States will establish their own procedures for review, and it is not appropriate for PHMSA to impose a ''streamlined'' process on state actions.

c. Approving agency.

NAPSR, States, and some industry commenters suggested that the rule be clarified that approval must be requested from the regulatory authority exercising jurisdiction. They considered the language in the proposed rule vague as to whether a state or PHMSA was the approving agency, or whether an operator could apply to either. One operator suggested that approval should be by States.

PHMSA response: PHMSA has always intended that the alternative interval provision in this rule would allow the regulatory authority exercising jurisdiction over the operator of the distribution pipeline to act on a proposal to use alternative intervals. We have clarified the language in the final rule to remove any implication that an operator may seek approval from either

[1] Pipeline Safety Improvement Act of 2002, Section 14.

[2] 49 Code of Federal Regulations, Section 192.907.

PHMSA or a state. Most distribution pipelines are regulated by state agencies and approval of changes proposed by those operators will be by the state.

d. Evaluation of proposals.

A number of commenters addressed the proposed requirement that operators proposing alternative intervals demonstrate that a reduced frequency will not significantly increase risk. NAPSR proposed that operators should be required to demonstrate enhanced system safety or, at minimum, that operation would be at least as safe under the proposed alternative. Iowa suggested a requirement for a substantially equal or superior level of safety. One operator requested that the meaning of a significant increase in risk be clarified by example, noting that the proposed language is unclear. Another suggested that the rule should not require a proposal for an alternative interval to include a no-significant-risk demonstration; the commenter noted that the core pipeline safety regulations are not risk based and suggested that risk must be considered on an overall basis vs. change-by-change.

Although commenters generally supported consistency between regulatory authorities, commenters also suggested that there is no single basis for judging the adequacy of the engineering basis for a proposed change, and that it is not practical or necessary to define requirements for performance/data analysis. One operator suggested that engineering analyses should be judged on whether they are performed by an engineer, are subject to internal review, use good data, and include logical analyses and conclusions. GPTC and one operator suggested that no additional analysis should be required if performance measures show that risk mitigation is effective.

AGA and several commenters noted that there should be no arbitrary limit on the change in interval that will be allowed.

PHMSA response: The rule does not require and PHMSA does not contemplate that operators will produce a precise quantitative estimate of risk. Accordingly, PHMSA recognizes that it is not easy to demonstrate that any action produces no significant increase in risk. However, regulating safety requires judgments weighing risk versus costs. Judgments of this type are what operators will need to support their proposals and regulators will need to consider. PHMSA does not agree that any reduction in safety intervals is unacceptable because the change alone would result in some increase in risk. Instead, the regulatory authority needs to make an overall judgment on the adequacy of proposed changes.

PHMSA has revised the final rule to require that alternatives, as part of the overall IM plan, provide an equal or improved overall level of safety. This change is intended to eliminate any implication that a quantitative estimate of risk is required. PHMSA expects that operators will be conscientious in demonstrating that proposals produce a level of safety that is equal or improved, on an overall basis, and that states will be reasonable in judging the adequacy of proposed changes.

PHMSA also agrees that it is unnecessary and likely impractical to establish specific criteria for approval of proposals for alternative intervals. Each proposal must be considered as a whole and on its own merits. PHMSA has not adopted any of the various alternatives suggested by commenters because each regulatory authority must exercise its judgment based on the circumstances of each request. However, PHMSA also recognizes the industry's need for some degree of consistency in how proposals are evaluated. PHMSA intends to work with the states to help assure a degree of consistency.

PHMSA is not specifying any limit on the intervals that may be authorized by the regulatory authority. The regulatory authority will be responsible for determining safe intervals based on the information in each operator's proposal.

e. Opposition.

The Florida Public Service Commission opposed the proposal to allow alternative intervals. The Commission maintained that waivers (their characterization) inherently reduce the established minimum safety level. They believe that processing these proposals will be burdensome and that proposed waivers would generally not be approved. If the provision is retained, they suggest that the risk analysis used as a basis for changes must be transparent to the regulator. They also suggest that the code be revised to require that operations and maintenance (O&M) plans be required to contain a summary of maintenance tasks and approved periodicity, since it will no longer be possible to use a common inspection template if operators are not required to conduct actions at the same intervals.

PHMSA response: Waivers from regulatory requirements (sometimes also called special permits) are a common regulatory tool. PHMSA permits pipeline operators to seek a special permit [3] and considers such requests on their merits. Although required periodic actions address threats of concern and a reduction in the periodicity of those actions inherently involves an increase in risk, adjustments to the frequency may be warranted when safety resources are applied to other areas of greater concern. Contrary to the assertion of the commenter, the use of waivers can result in a reduction in overall risk (i.e., improvement in safety), and regulators must make judgments regarding the overall effect of proposed changes.

The final rule requires that the regulatory authority make the decision to approve or disapprove any proposal for alternative intervals. PHMSA sees no need to add a requirement that risk analyses used for this purpose be ''transparent'' to regulators because an operator will have to work with the regulatory authority to provide enough information to evaluate the requested change. PHMSA also does not agree that a requirement that each O&M plan contain a summary of maintenance tasks and periodicity is needed. Florida, or other states, may require such changes or other information needed to facilitate their inspections as part of their process of reviewing an operator's proposal.

f. Costs and benefits.

Commenters generally agreed that any additional cost to states should be minimal. (NAPSR concurred, provided that States are allowed to follow their current procedures.)

Some comments suggested that the alternative interval provision will be of limited benefit. One operator suggested that the proposed requirement is too burdensome, involving significant administrative costs and burden associated with the need to use risk analyses to justify all changes. Another noted that there are limitations on the ability of operators to move resources from low-risk areas, including potential changes to labor agreements and reassignment of personnel. They requested that the rule recognize these limitations.

Some operators are concerned that failure of state regulators to approve alternative intervals will result in implementing additional actions to control risks without offsetting reductions where risk is low, thus increasing total costs.

PHMSA response: Cost issues are addressed in the Regulatory Impact Analysis and the Regulatory Flexibility Analysis located in the docket for this rulemaking.

This provision imposes no burden on operators. Use of alternative intervals is voluntary. Operators who conclude that obtaining approval would be too burdensome or that it would be too difficult to realign safety resources need

[3] 49 United States Code, Section 60118.

not apply. PHMSA therefore sees no need to revise the rule language to recognize that such situations may exist.

Operators apply safety resources to purposes other than inspections/actions required periodically by regulation. Operators will be able to realign those resources without regulatory approval, based on insights that their risk analyses may supply, providing a means by which they can make their safety activities more efficient, thereby permitting them to avoid increased costs.

g. An industry consultant suggested that the current requirement to inspect inside meter sets for atmospheric corrosion at 3-year intervals should be changed. He noted that experience shows these inspections are not needed and it is more efficient to change the requirement on a national basis.

PHMSA response: This is an example of a required periodic inspection where an operator could propose a modification if its analysis showed devoting resources in another area would be more beneficial from a safety standpoint. Changing this periodic requirement on a national basis is outside the scope of this rulemaking.

h. Some operators suggested that implementation of alternative intervals should be allowed, based on risk analysis, without requiring regulatory approval. They noted that reductions in effort, where found appropriate, are an integral part of implementing a risk-based approach. They expressed concern that state regulators will be unwilling to approve reductions from established intervals which, although not risk-based, are an accepted norm.

PHMSA response: PHMSA does not think regulatory approval should be eliminated. Regulatory oversight is appropriate for changes that involve reducing safety actions currently required by regulation. PHMSA recognizes that there may be some reluctance to approve reductions from an established norm; however, PHMSA plans to assist states to determine appropriate methods to evaluate proposals. PHMSA believes that these efforts will serve to address any reluctance on the part of state regulators to consider alternative intervals.

Comment Topic 7: IM requirements for master meter and LPG operators.

Many comments addressed the proposed limitation of requirements for master meter and LPG operators (MM/LPG) and PHMSA's request for comment on these limitations. PHMSA asked whether the proposed limitations were appropriate, whether further limitations were needed or if these operators should be exempt from IM requirements. PHMSA also asked whether similar limitations should be afforded to other types of operators.

a. Proposed limitations are inappropriate.

Two major trade associations addressed the proposed limitations for master meter and LPG operators. (Neither group's members include operators of this size.) AGA suggested that these smaller operators should be required to implement distribution IM, but that the requirements should be scalable, recognizing the uncomplicated nature of their facilities.

APGA agreed that MM/LPG should not be excluded from IM requirements. They noted that if mandatory reporting of plastic pipe damages is eliminated (as they suggested) the limitation essentially becomes an exclusion from filing annual reports. Master meter operators are currently excluded from annual report requirements. APGA ''would not object'' to adding a requirement that master meter and LPG operators evaluate and prioritize risk. APGA sees risk ranking as an integral part of assessing risks, and believes it will occur whether or not it is required explicitly in the rule.

NAPSR, Connecticut Department of Public Utility Control, Pennsylvania Public Utility Commission (PPUC), and several operators also commented that MM/LPG should be subject to IM requirements. They referenced the conclusion of the stakeholder groups that distribution IM should apply to all distribution operators. These commenters did not agree that these operators pose less risk, and maintained that simpler systems will inherently have simpler programs. They also noted that some master meter operators are much larger than the NPRM stated. PPUC explained that there are two master meter operators in its state with more than 6,000 customers. Other commenters noted that there is limited data on these systems, since they do not report incidents, and thus the risk may not be small.

The Arizona Corporation Commission (AZCC) commented that all LPG operators should not be treated like master meters, since some serve small towns, like local distribution companies and have the same limited control over the principal threat of excavation. AZCC suggested that LPG operators who serve a city, town, or other municipality within a specified service area as defined by the state agency with authority should meet the same requirements as other distribution system operators. AGA and NAPSR noted that LPG poses unique risks because the product is heavier than air, unlike natural gas. Leaks from these systems will not safely disperse, as will leaks from natural gas distribution systems.

PHMSA response: PHMSA is persuaded that there is a reasonable criterion to distinguish between LPG operators. PHMSA's concern with overwhelming small operators with limited resources and technical expertise is not applicable to LPG systems serving hundreds or thousands of customers because those operations are more like small natural gas distribution system operators. PHMSA notes that existing regulations include a criterion to differentiate between large and small LPG operators. Section 191.11 excludes LPG operators serving fewer than 100 customers from a single source from filing annual reports. Other LPG operators are required to file such reports. PHMSA has revised the final rule to embrace this same criterion. LPG operators serving fewer than 100 customers from a single source are treated like master meter operators. Other LPG operators must meet the same requirements as natural gas distribution pipeline operators.

We are also persuaded that MM/small LPG operators should not be exempt from ranking risks—a requirement we had applied to all other distribution operators in the proposed rule. We believe that these operators will gain a better understanding of their systems by going through the ranking process. Ranking the risks is almost inherent in the other requirements and should not impose an additional burden on these operators. PHMSA has added an element to rank risks to the requirements applicable to MM/LPG systems.

b. MM/LPG should be subject to limited IM requirements.

The Indiana Utility Regulatory Commission does not agree that MM/LPG should be subject to the same requirements as other operators. Indiana commented that although there are reasons that master meter operators could be perceived as posing higher risk (*e.g.,* lack of expertise/resources, distributing gas is not primary business, high population density), there has been no record of serious incidents at master meters in Indiana. They stated that these operators struggle to comply with existing rules and will have limited ability to analyze risks, even if the computer program APGA is developing (Simple, Handy, Risk-based, Integrity Management Program—SHRIMP) is available. Indiana suggested we should either exclude master meter operators from this rule or subject them to more limited requirements and allow them to

spend their limited resources achieving compliance with existing regulations.

While not supporting total exclusion, Missouri and New Hampshire state regulators supported limited requirements for MM/LPG. AZCC commented that the rule should be prescriptive and simple for master meter and small LPG operators, since these operators have limited capability, can be easily overwhelmed and may, if that happens, do nothing. The New Mexico Public Regulation Commission (NMPRC) supported excluding MM/LPG from administrative requirements of the proposed rule.

Iowa did not take a position on limiting requirements; however, Iowa and a large operator suggested that evaluation and prioritization of risks should not be excluded for MM/LPG. They see this as a critical step, and not particularly burdensome.

PHMSA response: While PHMSA agrees that there are some ''large'' MM operators, most of them are very small. Unlike the large/small LPG operator distinction, which exists in current regulations, all MM operators are treated the same, irrespective of size. Therefore, in this final rule, all MM are subject to the limited IM requirements.

The final rule imposes requirements similar to those for other operators but with more limited requirements for documentation, consistent with how these operators are treated in other regulations. They will not be required to report performance measures as they do not file annual reports.[4] Although these requirements are similar to those applicable to other operators, we have presented them separately, emphasizing that these programs should reflect the simplicity of the pipelines.

Some comments in response to the NPRM and comments made during earlier stakeholder discussions have disagreed with PHMSA's contention that MM/LPG operators pose less risk. Risk is generally considered to be the product of the likelihood of adverse events and their consequences. Determining risk thus requires knowledge of how often events occur and the consequences they produce. MM/LPG operators are not required to submit written incident reports. They are, however, required to make telephonic reports.[5] Events with serious consequences (*e.g.,* death or serious injury) are also likely to be reported in local news and thus to come to the attention of regulatory authorities. PHMSA therefore believes it is unlikely a large number of significant events have occurred on MM/LPG systems that are not reflected in incident data. That data includes few serious incidents on MM/LPG systems, supporting PHMSA's contention that the risk from these systems, while not zero, is relatively low. Indiana's comments about the dearth of serious accidents in the incident record are consistent with PHMSA's understanding of the risk of these systems.

c. MM/LPG should not be subject to IM requirements.

The National Propane Gas Association (NPGA) suggested that LPG operators should be exempt entirely. NPGA sees no perceived benefit from compliance with the proposed requirements. They noted that LPG systems are very small, that they generally include pipe runs measured in feet vs. miles, and that the total quantity of gas that could be released in an accident is limited by the capacity of the supply tanks, a limitation not shared with natural gas systems. NPGA maintained that their members are already sufficiently regulated, mostly by states and through the incorporation of NFPA Standard 58 (NFPA–58) into Part 192 by reference. They believe that NFPA–58 mirrors the requirements of Part 192 and the proposed rule and noted that the standard is already recognized as the primary governing standard in § 192.11(c) which states that the standard prevails in the event of a conflict between its provisions and Part 192. NPGA also suggested that applying this rule to LPG operators could have unintended consequences. In a competitive environment to reduce costs, operators could break up their systems to fall outside of regulation, thus removing safety oversight completely.

PHMSA response: In the NPRM we proposed a simpler set of IM requirements for MM/LPG operators, but we asked if these operators should be completely excluded from IM requirements. The bulk of comments supported limited requirements but opposed excluding these operators, arguing that simple pipelines would need only simple IM plans. In the final rule, PHMSA has not excluded these operators.

LPG presents unique hazards; accordingly, PHMSA believes pipeline safety will be enhanced by larger LPG operators engaging in more robust integrity management activities. As discussed above, large LPG operators are subject to the full IM requirements in the final rule, including the administrative requirements. Because of the physical nature of LPG and the safety risks it presents, PHMSA is not persuaded that small LPG operators should be exempted. Furthermore, NFPA Standard 58 does not ''mirror'' the integrity management requirements in this rule and does not adequately address the safety measures provided by this final rule. IM requirements will complement NFPA–58.

d. Limitations for small gas distribution operators (other than MM/LPG).

A consultant suggested that distribution IM should be limited to large operators at this time. He noted that the PIPES Act does not mandate such requirements for small operators and suggested that a phased approach would be prudent. He believes that small operators do not have the personnel or background to implement these requirements and that the associated costs will likely exceed the benefits. He noted that the risk from third-party damage on such systems is small, as operators' personnel see most of the system daily. He supported exclusion for small operators similar to that proposed for MM/LPG and suggested that PHMSA collect additional data to see if additional requirements are needed for these operators. A large operator also supported limited requirements for small operators, and would include the number of customers or mileage as a threshold criterion.

The Washington Citizens Committee on Pipeline Safety commented that the number of services should not be used alone to delineate small systems. They suggested that the type and uniformity of material, system complexity, geographic spread, and other risk factors be considered as well.

APGA suggested that criteria defining a small system should not include limitation to one pressure district and should not limit the type of appurtenances or equipment. APGA commented that these differences do not affect risk. Small distribution operators already file annual reports, so APGA believes that extending the proposed limitations for MM/LPG would have no value for other small operators.

NMPRC would exclude small operators from the administrative requirements of the proposed rule based on the number of customers or staff. NMPRC concluded that DIMP principles would be beneficial for these operators but that the associated administrative burden is too great.

Missouri would extend all of the MM/LPG limited requirements to small operators.

PHMSA response: PHMSA has not limited this rule to large operators. As

[4] Operators of LPG systems serving more than 100 customers are required to file annual reports.

[5] 49 Code of Federal Regulations, section 191.5.

noted in the NPRM, there is no established threshold to distinguish between large and small operators. In addition, the PIPES Act did not differentiate between large and small distribution operators. The PIPES Act requires, ''the Secretary shall prescribe minimum standards for integrity management programs for distribution pipelines.'' [6] We received few comments regarding how such a threshold might be established.

Rather than delineating explicit thresholds based on operator size, PHMSA expects that operators with small systems will need only simplified plans. Operators will be able to scale their programs according to the complexity of their distribution systems. For example, APGA's SHRIMP program will be available to assist small operators in developing their IM plans.

e. Limitations for other operators.

One operator suggested that limited requirements should also be established for ''circumstantial'' or ''incidental'' operators. This operator is a large company operating hazardous liquid pipelines, but operates a single gas service line from a local distribution company main to a flare at a petroleum barge dock. The operator believes it would be burdensome to have a distribution IM plan for this single service line. A consultant and GPTC also suggested that landfill gas operators should be treated like MM/LPG, since their systems are also small and pose limited risk.

New Hampshire recommended that operators of conventional distribution systems that also operate LPG should be allowed to use a single plan for both. One operator suggested that LDC operators that also operate MM/LPG should be allowed to use a single DIMP plan for both.

PHMSA response: As MM/LPG operators have not been excluded from IM requirements, we see no compelling reason to exclude these other ''small'' operators. PHMSA considers that the analysis of a small, simple system should be relatively straightforward and should result in a basic IM plan. PHMSA notes the commenter operating a single service line to a flare stack may be considered a large volume customer as long as the service line is not on public property. This final rule does not apply to in-plant piping to a large volume customer. Companies that conclude that compliance with a rule would be overly burdensome due to unique circumstances may have the option to apply for a waiver (or special permit), as permitted by the applicable regulatory oversight authority.

The rule does not require that operators of conventional distribution systems that also operate LPG have separate IM plans or that operators of both MM and LPG systems have separate plans for each. We expect that plans developed for their conventional pipelines in response to the other requirements of subpart P should also satisfy § 192.1015. PHMSA agrees that operators with multiple ''systems'' may benefit from having a single IM plan. However, it is also possible that operators who own multiple systems may operate them separately and may desire separate IM plans. Under the final rule, operators will have the flexibility to treat multiple systems under a common plan, or to address them separately.

Comment Topic 8: Transmission lines operated by distribution operators.

Many industry commenters suggested that piping operated by distribution operators but which is classified as transmission (mostly because it operates at greater than 20% SMYS) should be included in a distribution IM plan rather than in a separate transmission IM plan. These commenters suggested that this could be done in this rule or by changing the definition of a transmission line. Commenters explained that this ''transmission'' piping is usually operated as an integral part of the distribution system, and that it would be more efficient to treat it under distribution IM than under a separate transmission IM plan. Several commenters recognized that additional rulemaking may be needed to accomplish this change.

PHMSA response: PHMSA has made no change in response to these comments. The NPRM did not address changing the definition of transmission pipeline; therefore, such an action is outside the scope of this rulemaking.

The transmission IM regulations already provide for alternative treatment of low-stress transmission pipeline (<30% SMYS) [7] in recognition that this low-stress pipe is more likely to fail by leakage rather than by rupture. PHMSA also notes that stakeholder groups studied the appropriateness of treating low-stress transmission pipeline under distribution IM programs. The groups reviewed the existing research concerning the likely failure mode of low-stress transmission pipelines. The record indicated that failure is expected to be by leakage when the failure results from corrosion. It is less clear that the likely failure mode would be leakage when the failure results from prior mechanical damage (*e.g.,* from outside force). The stakeholder groups concluded that additional technical work is needed to better define the threshold stress level at which the likely failure mode transitions from leakage to rupture to determine if low-stress transmission pipeline should be addressed under a distribution IM program.[8] PHMSA may consider this change later but agrees with the stakeholder conclusion that additional research is required to support such a change.

Comment Topic 9: Part 192 requirement references.

NAPSR, APGA, and a number of operators objected to the proposed requirement that all operators must enhance their damage prevention programs (proposed § 192.1007(d)) because the requirement is open-ended. They suggested that § 192.614, which requires such programs, should be revised if current programs are deemed inadequate.

A consultant suggested that leak management requirements should be included in § 192.723 and damage prevention requirements in § 192.614. He generalized this comment by noting that PHMSA should avoid having two regulations that address the same thing. He considers IM as an extension of all of Part 192, and believes that proposed Subpart P should be limited to the high-level approach to IM and related documentation.

PHMSA response: The final rule requires that operators have and implement leak management programs. Programs to manage known leaks are different from periodic leak surveys required by § 192.723.

Operators are required to implement a damage prevention program under § 192.614. After further consideration, PHMSA determined a requirement to enhance damage prevention programs on gas distribution systems through integrity management was impracticable because these programs are largely state-run. PHMSA is persuaded that modifications to damage prevention requirements for distribution systems should be made through amendments to § 192.614 rather than through this rulemaking. PHMSA has eliminated the proposed requirement to enhance damage prevention programs as part of an integrity management effort. Although all references to the damage prevention requirements in § 192.614

[6] 49 United States Code, section 60109(e)(1).

[7] See § 192.941, What is a low stress reassessment?

[8] PHMSA, ''Integrity Management for Gas Distribution: Report of Phase 1 Investigations,'' December 2005, page 23.

have been removed, operators may find through the implementation of their IM programs that improvements to their damage prevention programs are needed.

Comment Topic 10: Hazardous leak definition.

Several commenters suggested we define hazardous leaks. The proposed rule would require reporting of the number of hazardous leaks repaired or eliminated as a performance measure. APGA, GPTC, NAPSR, Washington Citizens Committee on Pipeline Safety, and several pipeline operators suggested that a common definition is needed to assure consistent reporting and the ability to conduct meaningful analysis of this performance measure. Most suggested that the definition of a grade 1 leak in the current GPTC guidelines be adopted. One operator suggested a need to define the term ''leak,'' suggesting that usage is not consistent across the industry. AGA and a number of operators suggested that any needed definitions, other than excavation damage, should be included on reporting forms and their instructions rather than in the code and that this makes subsequent changes, if needed, easier.

PHMSA response: Although a ''hazardous leak'' definition was not explicitly part of our proposal, we did propose regulatory text including that term; accordingly, PHMSA has included a definition for ''hazardous leak'' in the final rule. This definition is drawn from GPTC guidelines already used by many operators to classify leaks. PHMSA does not see a need to define other terms suggested in comments for purposes of this rule. PHMSA is also adding a definition for small LPG operators to improve readability of the Subpart P regulations.

Comment Topic 11: Required documentation.

Proposed documentation requirements were seen as unreasonably burdensome. In particular, the proposed requirements to document ''all'' decisions and changes related to a distribution integrity management (IM) program and to keep all related records for the life of the pipeline were seen as unreasonable.

a. Scope of documentation.

Many commenters suggested deleting all documentation requirements other than the requirement to maintain an IM plan. Others suggested limiting documentation to significant changes, to be defined at the operator's discretion. NAPSR suggested that written procedures and documents supporting threat identification should be limited, noting that excessive documentation does not support safety. NAPSR would limit the requirement for procedures in proposed § 192.1005(b) to those that ''reasonably describe'' processes for developing and implementing IM elements. NAPSR further suggested requiring that procedures ''should provide adequate direction so that a person with reasonable knowledge of gas distribution facilities can follow them and produce a satisfactory result.''

One operator suggested that all the records that are needed are contained in their damage prevention plan and annual reports to PHMSA. Another operator requested clarification concerning the data to be captured to represent the ''material of which [newly installed piping systems] are constructed.'' One operator commented that the term ''documents to support'' decisions, analyses, or processes is vague.

AGA and several operators suggested changing proposed § 192.1015(c) from a written procedure for ranking threats to a description of how threats are ranked. They maintained that detailed procedures are not needed, but acknowledged that master meter and small LPG operators must be able to explain what was done to rank threats.

Florida Public Service Commission requested that operators be required to include in their IM plans a summary containing the risk analysis findings, the effect on safety, and a schedule for actions resulting from the distribution IM program.

PHMSA response: In the NPRM, the section regarding record retention (NPRM § 192.1015; Final Rule § 192.1011) required the following records: A written IM program; documents supporting threat identification; a written procedure for ranking the threats; documents to support any decision, analysis, or process developed and used to implement and evaluate each element of the IM program; records identifying changes made to the IM program, or its elements, including a description of the change and the reason it was made; and records on performance measures. PHMSA has removed this list of documents and simplified the language of the regulation to require operators to maintain documentation demonstrating compliance. Because of the simplified language, AGA's comment regarding ranking threats is moot. Generally, documentation demonstrating compliance will include documentation to show how the operator has fulfilled the requirements of each element of § 192.1007. PHMSA believes this is the type of information to which Florida was referring in its comment.

PHMSA has revised § 192.1005 to eliminate the proposed requirement that operator procedures describe ''the processes'' for developing and implementing its IM program. Although we did not include all of NAPSR's suggestions in the final rule language, we have modified the language so that the section now requires that operators have procedures ''for developing and implementing the required elements.'' Although PHMSA agrees that all procedures should be clearly written so that anyone who has to use them can understand and follow them, we did not include this language in the regulation text.

b. Documentation retention.

Commenters proposed limiting document retention to 10 years or, in a few cases, through the next regulatory audit cycle. Commenters universally considered that these documents would not be of value beyond these near-term periods and noted that resources to maintain such records would take away from those available to operate and maintain the pipelines.

GPTC and one operator suggested that required retention of performance measures be limited to 2 times the program re-evaluation period. They based this on the proposed 10-year retention, which would be twice the mandatory 5-year re-evaluation period. They noted that operators who evaluate their performance measures more frequently would be overly burdened by requirements to keep records beyond their potential useful life.

Iowa suggested deleting the requirements to retain, as records, a written IM plan and a procedure for ranking threats. They maintained that these are not records, per se, but rather are part of plans that are required to be retained by other regulations.

One consultant suggested revising or deleting the term ''must'' from the requirement that an operator must retain records for a specified period. He noted that an operator who retained records for a longer period would be in technical violation of such a requirement.

PHMSA response: PHMSA agrees that the proposed requirements for documentation retention were overly broad. PHMSA concludes that retaining documentation describing changes to an IM plan will be useful for some period, but agrees that these records would be of limited or no use many years after the changes are implemented. PHMSA has revised the final rule to require that operators maintain records demonstrating compliance for 10 years, and that these records must include superseded IM plans.

PHMSA disagrees that the IM plan is not a record. PHMSA considers that superseded IM plans are records—a record of what the IM program consisted of at a particular time. PHMSA does not consider it necessary or appropriate to delete the term ''must'' as recordkeeping is not voluntary. The 10-year retention requirement is a minimum requirement; operators may maintain records for a longer period.

Comment Topic 12: Excess flow valves (EFVs).

A number of comments were made concerning the proposed requirements related to EFVs.

a. EFV in Subpart H.

AGA, APGA, NAPSR, a number of operators and an industry consultant suggested that the requirement to install EFVs be moved to Subpart H rather than remaining a part of IM requirements. Although EFV installation is a PIPES Act requirement, they noted that this is not inherently an IM requirement. In the NPRM, PHMSA proposed to delete from Subpart H the requirement that operators notify customers of the availability of EFVs but to keep the performance standards for EFVs in Subpart H. The commenters consider this separation unnecessary.

AGA, NAPSR and several operators also requested that we clarify that EFVs are not required to be installed on branch service lines. They noted that the PIPES Act mandate addressed service lines to single family residences and that it is impractical to install EFVs on branch service lines.

PHMSA response: PHMSA has relocated the requirement to install EFVs to subpart H. It will now replace § 192.383. PHMSA has included in revised § 192.383 a definition of service line serving a single-family residence. This definition excludes branch service lines, consistent with the intent of our proposal in the NPRM.

b. Installed EFVs as performance measure.

APGA, GPTC, and several operators suggested that the number of EFVs installed should not be treated as a measure of IM effectiveness. This measure relates to the number of new or replaced services and is unrelated to whether IM is effective or not. These commenters generally did not object to collecting the data, only to its apparent treatment as an IM performance measure. One operator suggested that this item simply be added to the annual report. Another suggested not requiring it to be reported at all. A third requested clarification that the number to be reported is the total number of EFVs installed, which they believe to be PHMSA's intent.

PHMSA response: PHMSA agrees that the number of EFVs installed is not a measure of the effectiveness of a distribution IM program. PHMSA expects to need this information to respond to questions from NTSB and Congress (and perhaps other organizations) concerning the implementation of the PIPES Act provision requiring that EFVs be installed. The requirement to include this information in the annual report has been moved to § 192.383. See the comment topic discussing the annual report for more information.

c. Installation criteria.

Connecticut Department of Public Utility Control recommended that the EFV requirement be expanded beyond the PIPES mandate to all situations in which installation of an EFV is technically feasible. One operator suggested that the pressure criterion be revised to specify that the distribution system, rather than the service line, must operate at a minimum of 10 psig throughout the year.

PHMSA response: PHMSA has not made either change. The installation criteria included in the PIPES Act reflect the performance standards that have long been in 49 CFR § 192.381. Most EFVs manufactured in the U.S. comply with these criteria and PHMSA considers them to define, for practical purposes, where installation is feasible. States have the ability to impose additional requirements affecting circumstances not enveloped within the criteria in this rule if they can justify such requirements under state procedures. With respect to the operator's comment, the pressure at the valve location, i.e., in the service line, is the relevant criterion. It does not matter if pressure at some other location in the distribution system is lower than required.

d. Replaced service line definition.

One operator requested that the rule define a replaced service line as a natural gas service line that is entirely replaced, noting that this is consistent with the PIPES Act. GPTC and Iowa suggested that the definition of a replaced line now in § 192.383(a) be moved to § 192.381, since it would be lost with repeal of § 192.383.

Missouri Public Service Commission commented that installation should be required for circumstances other than entire replacement of an existing service line. They contend that the current practice, pursuant to § 192.383, is to require an operator to notify a customer of the availability of an EFV if replacement work provides an opportunity to install an EFV, even if this involves less than replacement of the entire service line. The Commission believes that PHMSA's intent was to require installation in the same circumstances and believes that the language in the proposed rule does not implement that intent.

PHMSA response: We have revised the reference to ''installed or entirely replaced'' to use the defined term ''replaced service line'' to eliminate confusion. PHMSA has retained the definition of replaced service line in the revised § 192.383(a) and requires installation for situations meeting this definition. EFVs, to be effective, are installed at or near the connection to the main. Using the defined term ''replaced service line'' avoids the misunderstanding expressed by the commenter; PHMSA does not intend to mandate additional excavation to install an EFV when another portion of the service line is excavated. The cost of excavation is the significant factor in installing an EFV, and PHMSA considers it appropriate to require installation when the area near the connection to the main has been exposed and an opportunity to install exists. It would not be prudent to forego this opportunity for installation simply because some downstream portion of the service line is not replaced.

e. Master meter/LPG exclusion.

NAPSR and Southwest Gas objected to the proposal's exclusion of master meter and LPG operators from the requirement to install EFVs. They noted that the PIPES mandate did not exclude these operators. They also suggested that these small operators do not have the degree of control over excavations that can cause damage, and thus over the threat that EFVs are intended to mitigate.

PHMSA response: In the NPRM, we requested public comment on whether we should limit the requirements imposed on MM and LPG operators. Although the PIPES Act mandate did not exclude these operators from the EFV installation requirement, we proposed to exclude them from the requirement because we expect few of these lines will meet the threshold performance requirements. Based on the comments we received, we have re-evaluated the proposal and determined they should not be excluded. We agree with commenters that the threshold performance requirements are a better means of excluding some systems than just a blanket exclusion. Thus, in the final rule, we have included master meter and LPG operators among the distribution operators subject to the requirement to install EFVs.

As stated above, we expect that because of the threshold performance

standards required for EFV installation, most of these simpler master meter and LPG systems will not meet the threshold and operators of these systems will install few, if any, EFVs as a result of this requirement. For example, many of these systems operate at very low pressures, and the rule provides that EFVs need not be installed where operating pressure is less than 10 psig.

f. Terminology.

One operator suggested that the references to § 192.381 should refer to ''performance standards'' rather than to performance requirements, as that would be more accurate.

PHMSA response: PHMSA agrees and has made this change.

Comment Topic 13: Guidance.

A number of comments addressed guidance available for implementing this rule.

a. PHMSA guidance.

AGA and several operators suggested that the guidance document prepared by PHMSA, and included in the docket, is not necessary. They noted that the GPTC Guidance for integrity management (an appendix to the GPTC Guide) is more complete and will be available separately from the GPTC Guide, at nominal cost. Iowa commented that PHMSA's guide is not useful and that it conflicts with the provisions in the rule concerning leak management. One operator suggested that the PHMSA guidance document contains adequate detail for master meter and LPG operators but that references to requirements for larger operators should be eliminated from it. They commented that the document does not accurately reflect reporting and other requirements for larger operators.

PHMSA response: PHMSA agrees that the GPTC appendix provides more information than PHMSA's draft guidance. PHMSA is concerned, however, that the GPTC appendix will not be useful for most master meter and small LPG operators. Many of these operators will likely not purchase the Guide or the separate appendix. The appendix contains more information than these operators need, and they often lack the technical resources to extract the more-limited information that is important to their operations. PHMSA considers it important to provide guidance focused specifically on the needs of MM/LPG operators and will edit its guidance document to do so. PHMSA will remove other information and defer to the GPTC appendix as guidance for larger operators.

b. GPTC Guide.

GPTC and an industry consultant noted that the preamble stated PHMSA would revise GPTC guidance if needed. They point out that only GPTC can change that guidance.

PHMSA response: The commenters are correct. The statement in the NPRM referred to potential changes PHMSA might make to its own guidance for MM/LPG operators, not to the GPTC guidance.

Comment Topic 14: Leak monitoring.

A large distribution operator suggested that the rule should not require operators to ''implement'' leak monitoring because that implies they do not now have such programs. They suggested that the rule require that operators ''have'' such programs. The operator also suggested that the rule delineate the contents of an effective program.

Several smaller operators suggested that leak monitoring should not be required in this rule at all. They commented that only risk measures indicated as appropriate by risk analysis should be required.

APGA noted that some operators do not monitor leaks; they repair all leaks. APGA contended that these operators should not be required to establish criteria to grade leaks. Operators who do not repair all leaks should have criteria for grading leaks not repaired.

PHMSA response: Leakage is the principal failure mode for low-stress distribution pipelines. Most incidents on distribution pipelines result from the accumulation of gas that has leaked from the pipeline. Section 192.703(c) already requires that hazardous leaks be repaired promptly, but operators may repair leaks at a later time if determined not to be hazardous. PHMSA considers it important that operators monitor these leaks to assure that hazardous conditions do not develop. At the same time, PHMSA recognizes that some operators repair all leaks when found and does not intend to require these operators to develop unnecessary monitoring programs. PHMSA also recognizes that most operators that do not repair all leaks when found already have leak monitoring programs. PHMSA has revised the final rule to require that risk mitigation measures include a leak monitoring program except if all leaks are repaired when found. PHMSA has also modified § 192.1007(e) to clarify that operators who repair all leaks when found do not have to categorize them for hazard for the sole purpose of performance monitoring.

PHMSA does not consider it necessary to delineate the contents of an effective leak management program in the rule. Operators should develop a program based on their knowledge of their pipeline system. The GPTC Guide also offers guidance regarding how to develop an effective leak management program.

Comment Topic 15: State authority.

Florida PSC commented that States must have the authority to review, analyze, and approve or deny an operator's distribution IM program. They contended that the programs will be unique and complex. They noted that evaluation of a program will require judgment and suggested that reaching an agreeable program may require several years.

NAPSR commented that the rule should explicitly recognize the need to include flexibility for States to accommodate their specific circumstances. They noted that this need was recognized explicitly in PHMSA's report to Congress on DIMP.

PHMSA response: Certified state regulators who exercise jurisdiction over intrastate distribution pipeline operators have the authority and obligation to inspect operator compliance with this final rule; however, PHMSA does not require an operator's plan to be approved by the regulatory authority. Regulators must review operator IM programs and direct changes in cases in which they determine that the operator's program does not comply with the rule. PHMSA recognizes that IM programs will be unique and can be complicated (reflecting complexity in some distribution systems) and that these programs will likely take several years to reach maturity. As noted earlier, PHMSA plans to develop and provide training and qualification programs for state inspectors. PHMSA intends to provide states with background information necessary for them to conduct reviews and to avoid large inconsistencies in the approach to IM across the country.

PHMSA's statements in this rulemaking record have consistently recognized that states must have the flexibility to address their specific circumstances. Nothing in the language of the rule restricts this flexibility. PHMSA understands that operator IM programs will vary based on differences in their pipelines and operations and that states need to consider each program on its merits. The rule establishes high-level requirements but leaves operators and their regulators (mostly states) to determine how best to do it in each individual circumstance.

Comment Topic 16: IM program evaluation and improvement.

A number of comments addressed proposed requirements to evaluate and improve distribution IM programs.

a. Continual evaluation.

APGA, Iowa, and a number of operators objected to the proposed requirement in § 192.1007(f) that an operator ''must continually re-evaluate threats and risks on its entire system.'' These commenters suggested that such re-evaluation be required on a periodic basis. They noted that continuous re-evaluation is unreasonable and that it doesn't follow from the concept of ''periodic evaluation and improvement'' (the title of this proposed paragraph).

PHMSA response: PHMSA considers that operators should evaluate the effectiveness of their IM programs on a routine basis, i.e., ''continually.'' That is a basic concept of an effective IM program that has been used in other IM regulations. Nonetheless, because of the overwhelming concern raised by commenters about this term, PHMSA has revised the final rule to require that such re-evaluations occur on a periodic basis, based on the complexity of the system and changes in factors affecting the risk of failure; however, re-evaluations must occur at least once every 5 years.

b. Continuous improvement.

One operator noted that making changes solely to show ''improvement'' can be disruptive and ultimately detrimental to performance.

PHMSA response: Continuous improvement is an important part of the philosophy underlying IM. Where evaluation of an IM program identifies changes that can improve the program's effectiveness, these changes should be incorporated into the program. The ultimate goal is to improve safety. Improvement cannot be realized without change.

c. Evaluation frequency.

NAPSR objected to the proposed requirement that operators must determine the appropriate period for conducting complete program evaluations based on the complexity of their systems and changes in factors affecting the risk of failure and that the interval selected may not exceed five years. NAPSR suggested that an evaluation be required annually (not to exceed 15 months), similar to the evaluation interval for other programs required by Part 192. NAPSR believes that five years is too long, noting that the stakeholder conclusion was that an annual review should be required.

PHMSA response: An operator should re-evaluate its IM program whenever changes occur in the system that may result in new knowledge, new threats or other information that would permit improvement in the IM program. For some operators, this may be more frequent than an annual basis. For other operators, these types of changes may occur seldomly. Therefore, we are retaining the requirement for all operators to evaluate their program at a period appropriate for their system and at least every five years, as proposed in the NPRM.

d. Required improvement at specific frequency.

Several operators objected to the proposed requirement to periodically improve each IM element in § 192.1005(b) (as well as the requirement to continually refine and improve in proposed § 192.1007(a)(4)). They maintained it may not be reasonable to ''improve'' all elements at all times, and that enforcement of such a requirement would pose problems. They suggested that the proposed requirements to ''improve'' be replaced with a requirement to review and adjust/update as needed to meet distribution IM goals. One operator read proposed § 192.1007(d) to require that operators implement new mitigation measures annually and requested we clarify that this is not required.

PHMSA response: PHMSA's intent was to encourage operators to consider potential improvements to their IM programs routinely as a regular part of their activities. To improve clarity, PHMSA has revised the final rule to require that programs be reviewed on a periodic basis and improved as needed. Section 192.1007(d) requires that operators determine and implement measures to reduce risks. Section 192.1007(f) requires that operators reassess their programs periodically, but at least every five years. Nothing in the rule requires that new mitigation measures be implemented at any periodicity.

e. Redundant requirements.

One operator suggested we delete the proposed requirement in § 192.1005(b) that operators have procedures for ''periodically improving each of the required elements''. The operator noted that periodic evaluation and improvement is, itself, an element, and that this makes the proposed requirement in § 192.1005(b) confusing, at best.

PHMSA response: PHMSA agrees and has revised the final rule. We have revised section 192.1005 to specify that an operator must develop and implement a written IM program that addresses the required elements in § 192.1007. Section 192.1007 now provides that the IM plan must have procedures to develop and implement the required elements. One of the required elements is to refine and improve the program as needed (section 192.1007(a)(4)).

f. Consideration of threats in re-evaluation.

Another operator suggested that PHMSA delete the requirement in proposed § 192.1007(f) that an operator ''consider the relevance of threats in one location to other areas'' as part of its periodic re-evaluation. This operator contended that this is covered by the requirement in proposed § 192.1007(c) that threats be considered in all areas.

PHMSA response: PHMSA recognizes that a thorough evaluation of threats in any area should identify threats of concern regardless of whether they affect other areas of an operator's system. Still, PHMSA considers that knowledge that a threat affects a system in one location, and how that threat manifests itself, can inform consideration of that threat in other locations. PHMSA has retained this requirement in the final rule.

Comment Topic 17: Permanent marking of plastic pipe.

The NPRM preamble posed a number of questions concerning permanent marking of plastic pipe. These questions elicited a number of responses.

a. Support for marking

One operator strongly supported requirements to mark plastic pipe, providing a list of attributes the operator believes should be marked every 18 inches.

b. Against marking

AGA, supported by at least one operator, suggested that plastic pipe marking should be considered outside of DIMP. Both maintained that manufacturer input is needed on this subject and that most operators do not possess the data infrastructure to record and properly manage data from each piece of plastic pipe. They contended that the knowledge requirements of proposed § 192.1007(a) are sufficient to manage pipeline integrity.

Several operators suggested that ASTM should address pipe marking and that PHMSA should not establish requirements in this area. Some operators, GPTC, Iowa and one plastic pipe consulting company noted that the current version of ASTM D2513, which is not yet referenced in Part 192, includes permanent marking requirements. Some operators noted that fittings are a separate concern and suggested that they would present other problems/considerations.

PHMSA response: We did not propose a requirement to mark plastic pipe. Rather, we asked for comment to elicit better information about various pipe types and their performance history. PHMSA believes operators may be able to better manage risk with better information regarding pipe

performance. We plan to address this issue outside this rulemaking.

Comment Topic 18: Continuing surveillance.

Iowa and a large operator suggested that we revise § 192.613, Continuing surveillance, to exclude distribution systems subject to proposed new Subpart P because it will be a redundant and unnecessary requirement if DIMP is implemented as proposed.

PHMSA response: PHMSA disagrees. While some aspects of IM may overlap activities operators perform as part of continuing surveillance, there are requirements in § 192.613 that are not duplicated in this rule. For example, DIMP does not specifically require an operator to recondition or phase out an unsatisfactory segment when no immediate hazard exists.

Comment Topic 19: Information gathering.

The NPRM proposed (§ 192.1007(a)) that an operator must demonstrate an understanding of the gas distribution system. NAPSR suggested that the proposed rule should require operators to assemble information about their systems that is ''reasonably available.'' NAPSR maintained that it is unreasonable to suggest operators should develop the best understanding possible. NAPSR further maintained that the proposed language fails to list useful sources of information and implies an unbounded need for knowledge. NAPSR would revise the language to more completely identify the sources of information to be used and would limit the requirement to identify system characteristics and environmental factors (proposed sub-paragraph (a)(1)) to those ''reasonably'' necessary to assess threats and risks.

PHMSA response: PHMSA understands NAPSR's concern. PHMSA does not intend that operators expend excessive effort, review every record available in their archives, or explore every nuance about their pipelines. At the same time, PHMSA expects that operators will devote sufficient effort to develop as thorough an understanding of their pipelines as they can while using reasonable effort. PHMSA has revised the final rule to require that operators develop an understanding of their pipeline systems ''from reasonably available information.'' PHMSA considers that this strikes the appropriate balance. Because of this change, PHMSA does not consider it necessary to modify subparagraph (a)(1) to limit information to assess threats and risk to ''reasonably'' necessary information.

PHMSA has not included in the rule a list of information that operators should use to find information about their pipeline systems. An operator is in the best position to determine what information is most relevant to its system. PHMSA is concerned that any such list would become limiting (i.e., operators and regulators would not consider sources not included in the list) or would create unnecessary burdens (e.g., a perceived obligation to review a source listed even though it would not reveal useful information).

Comment Topic 20: Knowledge of pipeline.

PHMSA also received other comments regarding the need for an operator to know its pipeline:

a. Environmental factors.

APGA, GPTC, and a large operator suggested that we clarify ''environmental factors'' in § 192.1007(a)(1) to mean factors (*e.g.,* washouts, landslides) that could pose a hazard to the pipe as opposed to factors that would make the environmental consequences of accidents worse. They noted that gas does not produce significant environmental consequences as would oil or other hazardous liquids.

PHMSA response: PHMSA concludes that no change is needed. This paragraph already refers to ''environmental factors that are necessary to assess the applicable threats and risks to its gas distribution pipeline'' and does not refer to consequences. PHMSA notes that washouts and landslides are extreme examples of ''environmental factors'' that might be of concern. Other environmental factors that might need to be considered include soil corrosivity or location in an area likely to experience a greater-than-normal amount of excavation activity.

b. Normal activities.

One large operator suggested that the ''normal activities'' through which operators are expected to glean additional knowledge (proposed 192.1007(a)(3)) be specifically limited to, ''normal activities performed in the construction, operations, and maintenance of gas distribution systems in accordance with the applicable requirements of Part 192.''

PHMSA response: PHMSA does not consider this limitation necessary. Operators are expected to take advantage of opportunities to improve system knowledge through any of their normal activities, including those that go beyond those activities specifically required by Part 192. For example, excavation that exposes the pipeline system presents a significant opportunity to learn additional information, but few excavations are conducted specifically to comply with Part 192 provisions.

c. Additional activities.

PA PUC would expand the list of activities through which operators are expected to gain additional knowledge to include maintenance and management policies in addition to past design and operations (§ 192.1007(a)(2)). They would revise proposed § 192.1007(a)(4) to replace the requirement to ''continually'' refine and improve knowledge with a requirement to ''develop an ongoing process by which the operator's knowledge of its system will be refined and improved.''

PHMSA response: PHMSA's use of ''operations'' in this context was intended in its broadest sense—activities associated with operating the system, including maintenance. This comment indicates that it is possible to read the proposed language as excluding maintenance. PHMSA has modified the final rule to reflect that information gained from operations and maintenance should be considered. PHMSA considers the phrase ''management policies'' to be vague and subject to misunderstanding and has not included it in the final rule. Changes associated with eliminating the implication that operators must ''continually'' improve their knowledge have been described above.

d. Design and operations information.

One operator would delete proposed paragraph (a)(2), which would require that an operator understand the information gained from past design and operations, because it is unclear how compliance can be achieved or demonstrated. Another operator would add ''design and operations'' to the requirement in proposed paragraph (a)(1) to understand the system.

PHMSA response: PHMSA has revised paragraph 192.1007(a)(2) to require that operators consider lessons from past design and operation experience, rather than that they ''understand'' them. For example, operators could involve maintenance foremen/supervisors in their information collection activities, surveying them to ask about unusual circumstances they have encountered in their activities and/or asking them to review resulting system descriptions and identify any information they believe useful that is not already included. Good information only has an effect when it is used. Compliance will be reviewed by assuring that an operator has implemented means to gather this information and has considered the information.

e. Terminology.

An operator would change ''piping system'' and ''piping and appurtenances'' in paragraph (a)(5) to ''pipeline'' for consistency with the definition of pipeline in § 192.3.

PHMSA response: PHMSA has made the suggested change.

Comment Topic 21: Threat identification.

Several changes were suggested to the proposed requirement for operators to identify threats in § 192.1007(b). Paragraph (b) listed categories of threats and potential sources of information an operator must consider.

a. Data sources.

APGA would delete reference to ''one call experience'' because the meaning of this term is unclear and would add nothing beyond the operator's own damage experience. One operator would limit ''incident history'' as a data source to incidents requiring reporting per § 191.3. Another operator suggested that the list of threats be revised to match the list in the annual report, noting that there are minor inconsistencies in the wording of the proposed requirement. An operator suggested that ''and any other concerns that could threaten the integrity of the pipeline'' is unlimited and thus unreasonable.

PHMSA response: Because relevant information from one call experience would overlap with the operator's own excavation damage experience, PHMSA agrees that listing one-call as a source of information for threat identification is redundant and has made the suggested change. The term incident, as used in the regulations, is commonly understood to refer to incidents as defined in § 191.3. The list of categories in this final rule is consistent with the categories in the annual report. What minor wording inconsistencies exist are due to use of the list in a sentence structure in the rule. PHMSA considers the language regarding ''any other concerns'' to be consistent with the ''other'' category of threats on the annual report form.

b. Sources of information.

NAPSR and Iowa contended that the proposed language unnecessarily restricts sources of information an operator may use (i.e., ''An operator must gather information from the following sources''). Instead, NAPSR would require that an operator consider sufficient data to identify existing and potential threats and would identify the proposed list as sources an operator ''may include, as appropriate.''

PHMSA response: PHMSA agrees and has revised the paragraph to clarify that the information sources an operator must use to identify threats are not limited to those listed.

c. Third party damage.

A consultant noted that the threat of third-party damage should not be as significant for small operators as for large because small operators exercise better control and/or it is easier to patrol their systems. At the same time, he noted that his own analyses of small systems (i.e., master meter) suggests that threats other than third-party damage may be as significant or more significant for small operators than for large.

PHMSA response: Each operator will be required to determine the relative importance of threats for its distribution pipeline as part of implementing this final rule. An operator will be able to factor in the degree of control it has over its system when determining the relative importance of threats. We have not revised the language in the final rule.

Comment Topic 22: Risk assessments.

Several comments addressed the proposed requirements for risk assessment in § 192.1007(c).

a. Subdividing a pipeline for risk analysis.

NAPSR and one operator commented that subdivision of a distribution system for risk analysis may not be geographical, as they believe the proposed language implied. They noted that similarity of characteristics and environment may be more important factors for subdividing analyses than location. The operator suggested that class location might be an appropriate factor. Other operators suggested that the concept of ''regions'' for analysis is not clear and commented that the suggestion for grouping by consistent risk or actions be eliminated; they noted that one cannot group by common risk without analyzing risk first and that suggesting otherwise results in circular logic.

PHMSA response: PHMSA agrees that subdividing a distribution pipeline system for risk analysis could be done on a basis other than geography. PHMSA has modified the final rule to clarify that geographic proximity is only an example of how a region may be defined, by inserting ''e.g.,'' before this description and by adding another example. PHMSA agrees that the concept of creating regions for risk analysis on the basis of reasonably consistent risk results is circular logic and has deleted this criterion.

b. Evaluate threats.

One operator suggested that the requirement to evaluate threats as part of the risk assessment be limited to known threats because it is impossible to rank the importance of ''potential'' threats.

PHMSA response: PHMSA disagrees. In many cases, ''known threats'' are treated as threats that have resulted in an effect on the pipeline, while other threats are, at best, ''potential.'' For example, earth movement might not be considered a ''known threat'' for pipe located in an area where landslides can be expected but where the pipeline has never been affected by one. It would be important, though, to consider the likelihood that the ''potential'' threat of earth movement might affect this pipe as part of an operator's IM program. It should also be possible to collect information about the relative likelihood of a landslide to consider this threat, including ranking its importance and determining whether mitigative actions are appropriate. PHMSA has retained the requirement to consider potential threats in the final rule.

c. Defining terms.

One operator suggested that the term ''relative probability'' should be defined. Another operator suggested that the term ''probability'' be replaced with ''likelihood'' throughout the proposed rule, to eliminate the implication a rigorous mathematical process is required.

PHMSA response: PHMSA agrees that use of the terms ''probability,'' ''relative probability,'' and ''prioritize'' could imply a need for a mathematical process. PHMSA has noted confusion about the need for quantified estimates of risk throughout the discussions related to distribution integrity management. For complex systems where there is a wealth of data, a mathematical analysis of risk may be the best way to understand the relative importance of various threats. For most distribution pipeline systems, however, simpler techniques (as described in the GPTC Guide, for example) should suffice. PHMSA has revised the final rule, to avoid further confusion, to replace these terms with ''importance,'' ''relative importance,'' and ''rank.'' One useful reference tool could be the GPTC Guide for guidance on non-mathematical methods of evaluating risk.

d. Prioritize risk.

One operator suggested that the requirement to estimate or prioritize risk should be eliminated, and that the requirement be limited to determining the relative probability of threats. The operator contended that each pipe material carries its own threats, and that it is difficult to prioritize one over another. Prioritization is too difficult and may not meet the intended purpose because there is often insufficient data to quantify.

PHMSA response: PHMSA disagrees with eliminating a requirement to prioritize risk. Prioritizing actions is an inherent part of managing any activity. It is needed to apply limited resources where they will do the most good. With respect to IM, PHMSA firmly believes that this prioritization should consider risk, i.e., both likelihood and consequences. For example, an operator may face two threats that can produce different consequences. It would be inappropriate to apply resources to the threat with a slightly higher likelihood of occurrence and not to the second threat if the consequences that could result from the second threat are much greater. The risk (*i.e.,* likelihood and consequences) of the second threat is higher.

PHMSA understands that it is easier to rank threats when only a single variable changes, and that limiting consideration to threat ranking by material would be easier. This would not, however, assure the most effective application of safety resources, which an operator must apply across its entire pipeline, regardless of differences in the material of construction.

Comment Topic 23: Performance measures.

A number of comments were made concerning proposed requirements for performance measures. In the NPRM, PHMSA proposed that an operator must develop and monitor performance measures to evaluate the effectiveness of its IM program and required the performance measures to include the number of hazardous leaks, categorized by cause and by materials, number of excavation damages, the number of excavation tickets, the number of EFVs installed, and the total number of leaks categorized by cause. The proposal required an operator to develop additional measures necessary to evaluate the effectiveness of controlling each identified threat.

a. NAPSR suggested an additional performance measure, which could be derived from data already reported: the amount or ratio of non-state-of-the-art pipe in an operator's system.

PHMSA response: PHMSA does not agree that this is an appropriate national measure. This measure was considered in the work of the stakeholder groups. The final report of that work did not recommend this as a national performance measure.[9] One reason for this conclusion was that it could be misleading. Much older pipe (*e.g.,* cast iron) that has been properly maintained operates quite safely. At the same time, problems have sometimes been experienced with new pipe (*e.g.,* specific heats of plastic pipe). PHMSA recognizes that many states are working with their operators to support pipe replacement programs intended to replace non-state-of-the-art pipe, and PHMSA encourages those efforts. PHMSA expects that the states will monitor the amount of non-state-of-the-art pipe remaining in an individual operator's system as part of such replacement programs. Reporting this parameter on a national basis is not needed to facilitate required pipe replacement programs.

b. The proposed performance measures included the number of hazardous leaks eliminated or repaired and the number of excavation tickets. A consultant suggested the need for more precise definitions of ''ticket'' and ''leak'' as the use of these terms is imprecise across the industry. Two operators agreed that a definition of excavation ticket is needed. Another suggested that this be limited to ''tickets received from the notification center where marking is required.'' Another suggested that PHMSA should not define this term.

An operator suggested that damages should be normalized per 100 tickets. The operator noted that differing levels of construction activity could imply that an operator's IM program is more, or less, effective but that this is totally outside the operator's control. Another operator suggested that the number of excavation tickets has no value as a performance measure, and that this data is expensive to generate. This operator explained that tickets are often issued for areas in which there is no gas pipe in the vicinity of planned excavation and that tickets may be renewed. These operators also suggested that tickets are issued for areas of differing size. They contended that, because of all of these differences, this data is not useful to normalize excavation damage information.

PHMSA response: The purpose of the measure to report the number of excavation tickets is to normalize excavation damage information in order, for example, to help determine whether reduced excavation damages are a result of improved damage prevention programs or less construction (excavation) activity. Normalization is necessary precisely for the reason identified by the commenters—changes in the amount of construction activity will affect the number of excavation damages but are outside the control of an operator's IM program. PHMSA expects that analyses will likely normalize per 100 tickets but notes that this is a simple arithmetic adjustment if the basic data is available. Operators are required to participate in one-call programs to receive notification of planned excavation activity, i.e., tickets.[10] PHMSA thus concludes that collecting this data will not be expensive. Reporting of this parameter has thus been retained in the final rule.

Differences in how tickets are treated and in the definition of ''ticket'' among various state one-call programs were discussed during the stakeholders' work preceding the proposed rule. The groups noted that this term is defined somewhat differently by various state one-call programs, and that these differences could cause inconsistencies in data reported to PHMSA. At the same time, the groups noted that considerable additional effort could be required for operators to track tickets in two ways—one matching their one-call program definition and one matching a common national definition. The stakeholder groups concluded that this data could serve its purpose even if there were some inconsistency in the data reported to PHMSA and that the additional burden involved for some operators using two definitions was not justified. PHMSA agrees. The final rule clarifies, as did the proposal, that what is meant by a ''ticket'' is receipt by the operator of information from the notification center, regardless of the criteria the center uses to decide when notifications should be made.

Leaks have been reported on the annual report required of distribution operators for many years. The instructions for completing the annual report define a leak as the unintentional release of gas from a pipeline. PHMSA is not aware of any difficulties or confusion in reporting leaks, and does not consider that a definition need be added to this rule.

c. A consultant suggested that the requirement for operators to measure performance should be deleted. Alternatively, PHMSA should evaluate incidents against program effectiveness. The consultant believes that individual operators cannot generate enough data for meaningful analysis and that problems inherent in performing statistical analysis of small numbers and luck, both good and bad, would likely obscure meaningful information from an operator's performance analyses. Two commenters suggested that the performance measures requirement be eliminated. An operator suggested that the rule should simply require that

[9] PHMSA, ''Integrity Management for Gas Distribution: Report of Phase 1 Investigations,'' December 2005, page 16.

[10] 49 Code of Federal Regulations, Section 192.614(b).

operators have appropriate measures. Iowa suggested that the requirements are not needed if the annual report forms are modified to include the desired information.

The NPRM preamble noted that a reduction of incidents will be the ultimate indicator of performance, but that it will take years to see trends in this data. The NPRM stated that the proposed performance measures would provide a measurement during the interim period while these trends are developing and invited the public to suggest other measures for this interim period. In response, one operator commented that there should be no interim measures, only permanent. Another operator, apparently reflecting the same concern about potential changes in reporting requirements, suggested that performance measures, once in place, should remain stable for at least 5 years. The operators noted that time is needed to determine the effectiveness of such measures and to implement data system changes and personnel training.

PHMSA response: Measuring performance is a key element of all integrity management programs. IM rules for other types of pipelines also include this element. At its basic level, IM is an iterative process consisting of analysis of risks, implementing actions to reduce risk, monitoring to evaluate the effectiveness of those actions, and modifying the program as needed. Without performance monitoring, the feedback portion of the process cannot occur.

On a macro basis, PHMSA agrees that the number of incidents is the ultimate measure of the effectiveness of efforts to assure distribution safety. PHMSA will continue to collect incident data and will use that data to evaluate the effectiveness of its regulatory program. This measure is not useful to individual operators, however, precisely because the number of incidents is small. Many operators will experience no incidents in a year. Few, if any, will experience more than one. Operators must use other non-incident measures to evaluate the effectiveness of their own programs. PHMSA continues to conclude that it is appropriate that the rule require these actions.

As discussed in the NPRM, it will take several years for incident data to indicate any trend as a result of the actions required by this rule. PHMSA considers it necessary to collect additional performance measures to permit preliminary judgments concerning the effectiveness of this regulation in the interim. This does not mean that these measures are not ''permanent.'' The final rule retains the requirement to submit performance measures in the annual report.

d. A citizens group commented that key information, such as hazardous leaks repaired by cause and material, must be publicly available. NAPSR and the Pennsylvania PSC also suggested that data reported to PHMSA should be in a database accessible to states, rather than requiring duplicate reporting. The Arizona Corporation Commission, taking a contrary position, suggested that reports sent to PHMSA should also be required to be submitted to States exercising jurisdiction.

PHMSA response: All IM performance measures submitted to PHMSA will be part of the annual report filed by distribution pipeline operators. Annual report information is available to the public via the PHMSA web site. In addition, we are requiring operators to report performance measure information to states exercising jurisdiction.

e. NAPSR and Iowa suggested that the number of leaks repaired/replaced by material be added as a national performance measure, as this is useful information relevant to the effectiveness of IM. These commenters also suggested that the requirement to report information concerning leaks be limited to information that is known or available. They noted that operators may not excavate leaking pipe, but may replace it and retire leaking sections in place. In that instance, they may not know the cause of the leak, or the particular material on which it occurred (*e.g.,* whether on pipe body or a valve/fitting).

PHMSA response: The stakeholder groups considered the use of leaks-by-material as a national performance measure but rejected it as a measure in part because of the potential for misinterpretation. Many leaks are caused by excavation damage or other outside forces, in which case the pipe material is not of principal importance. The groups concluded that this would be useful information for operators in evaluating the effectiveness of their own programs but that it should not be reported on a national basis. PHMSA agrees.

PHMSA notes that operators have been required to report the number of leaks eliminated/repaired, by cause, for many years as part of their annual reports. Operators have presumably filed these reports based on the information that they have available. PHMSA is not aware of complaints that unnecessary effort has been required simply to determine a cause for reporting purposes. PHMSA therefore does not consider that any explicit limitation is necessary on the information to be used to identify the cause of repaired leaks.

f. An operator suggested that specific causes to which leaks are to be attributed should be listed, and further that the list of causes must include ''unknown.'' The operator suggested that meaningful comparisons require a limited number of specified causes. The operator also noted that lines are often retired in place rather than being removed, and that the cause of leaks is thus not always known.

PHMSA response: Performance reporting will be via the annual report. The annual report currently requires that operators report leaks repaired by cause. It lists a number of causes for this purpose, including ''other.'' Any revisions to the form for purposes of IM performance measures will similarly provide a list of causes. See the annual report comment topic for more information regarding changes to the annual reporting form.

g. NAPSR, Iowa, and one operator suggested that we clarify ''any additional measures'' described in proposed § 192.1007(e)(1)(vii) are additional measures the operator selects.

PHMSA response: PHMSA has made this clarification.

h. One operator suggested that PHMSA should establish guidance for implementing uniform metrics, since these are needed for a performance-based process.

PHMSA response: PHMSA will use four measures to evaluate the overall effectiveness of this regulation. These measures are specified in this rule, will be listed on the revised annual report form, and will be in the instructions for completing the annual report. As discussed above, PHMSA expects that there will be some inconsistencies in reporting of at least one measure (number of excavation tickets); however, the data submitted with the annual report will be sufficient for PHMSA to evaluate the effectiveness of the regulation.

PHMSA does not consider that further guidance is necessary to assure that operators are collecting other performance measure data uniformly, as that data will be used by individual operators to evaluate the effectiveness of their programs. An individual operator should collect and use the data it collects consistently; however, differences between operators do not matter.

Comment Topic 24: Regulatory analysis.

We received a number of comments concerning the regulatory analysis

supporting the proposed rule: In response to a question about whether the proposed performance measures were burdensome, two commenters stated they were not. Other commenters raised specific issues regarding the regulatory analysis.

a. Assumptions used in the analysis.

NAPSR, AGA, an operator association, and an individual operator commented that assumptions made in the analysis are not supported. In particular, the assumption that implementing the proposed rule will result in a 50 percent reduction in incidents, which is key to the analysis of the benefits of the proposal, appears to have no foundation.

PHMSA response: It is not possible to determine precisely the effectiveness of a new regulation before it is implemented. It is therefore necessary to make assumptions for purposes of analysis. The analysis then includes an evaluation of the sensitivity of its conclusions to those assumptions. Here, PHMSA expects that the regulation will help ensure the integrity of distribution pipelines and will reduce the number and severity of incidents that occur on these pipelines. An assumption of a 20 percent to 50 percent reduction in incidents was made for purposes of analysis, but that assumption is not critical to the conclusions. The final regulatory impact analysis demonstrates,[11] in fact, that societal costs associated with gas distribution need only be reduced by about 12.2 percent in the first year and 9.5 percent in successive years for the rule to yield positive net benefits.

b. Lost gas.

AGA and an operator noted that assumptions concerning lost gas are not supported. They refer to the stakeholder report where the difficulties of measuring lost gas are discussed. That report states that reported ''lost gas'' often reflects measurement uncertainties rather than actual losses.

PHMSA response: Whether the amount of lost gas can be measured with accuracy does not affect whether gas is actually lost. PHMSA understands that the amount of lost gas reported may depend as much on measurement uncertainties as on actual losses, but concludes that actual loss does occur. This rule will have the effect of improving leak management, and damage prevention. The requirement that excess flow valves be installed will reduce the amount of gas released if a service line is damaged by excavation. All of these actions will reduce the amount of gas lost. PHMSA has relied on information from the EPA for its assumptions concerning lost gas, and considers that the estimated reduction of 10 percent cited in the regulatory impact analysis is reasonable.

c. Competitive market.

AGA, an operator association, and an operator disagreed with our conclusion that local gas distribution is not a competitive market. They noted that utility commissions consider all market forces and that some States have deregulated this function.

PHMSA response: PHMSA recognizes that utility regulatory commissions consider market forces in their rate regulating activities and that some aspects of natural gas supply have been deregulated in some States. Nevertheless, distribution of natural gas has not been completely deregulated in any areas of which PHMSA is aware—i.e., a customer does not have a choice of multiple suppliers for natural gas delivered to its residence or place of business. Thus, PHMSA considers that the statement made was accurate. It did not affect the conclusions of the analysis.

d. Cost effective.

FL PSC suggested that the proposal is not cost effective, noted that recent regulatory extensions have been extensive, and suggested we review the current regulations, in total, before proposing more. They pointed to a rate case in which a company is requesting $750,000 to implement distribution IM for a system containing 10,000 miles of distribution mains, and that applying the unit rate to the total mileage of distribution mains in the U.S. would result in an estimated implementation cost of nearly $84 million. This would equate to more than $3.8 million per death averted if all deaths resulting from accidents on distribution systems could be eliminated, which they contend is not a practical assumption. FL PSC also commented that State regulators are overburdened and cannot do more than they are now.

PHMSA response: It is unclear what basis an operator would have used for a rate case addressing implementation of distribution IM at the time of the NPRM, since requirements for that purpose were not final. This final rule makes significant changes from the NPRM, most of which will have the effect of reducing costs. PHMSA has analyzed the costs and benefits that are expected to result from this final rule and has concluded that the rule is cost-beneficial.

PHMSA recognizes that State regulatory programs will be required to undertake new work as a result of this rule. PHMSA supports State pipeline safety programs through grants and is increasing the level of that support. States exercise regulatory authority over intrastate pipelines once they are certified by PHMSA to do so.

e. Burden hour estimate.

A consultant noted that the estimate in the regulatory analysis of ¼ hour for master meter operators to update their programs is unrealistic. He believes that 4 hours is a better estimate for such an update.

PHMSA response: The regulatory analysis and the paperwork reduction act burdens have been recalculated based on comments to the NPRM. PHMSA has revised the estimate to twelve hours per year for master meter operators to update their programs.

Comment Topic 25: IM for new pipelines.

The Missouri Public Service Commission noted that the proposed rule provides many requirements to address the integrity of existing distribution pipeline systems but is silent on the need to assure integrity for new installations. Missouri suggested the rule address how well a pipeline system is built/constructed/installed, which is critical to its integrity. Missouri also suggested adding increased inspection requirements for contractors performing new installations to assure the integrity of new pipelines being installed, and to not install pipelines today that will create integrity issues in the future.

PHMSA response: PHMSA agrees that good installation/construction is important to assuring pipeline integrity. This proposal, however, deals with assuring the integrity of existing pipeline systems. Construction is addressed by other regulations for which changes were not proposed as part of this rulemaking. PHMSA may consider changes to construction regulations as part of future rulemaking activities.

Comment Topic 26: Annual report form.

One operator suggested that PHMSA should develop its reporting forms by working in conjunction with AGA and APGA.

PHMSA response: All data required to be reported will be reported via the annual report. PHMSA has revised the annual report form using its normal procedure, which included consultation with the trade associations.

This final rule requires operators to report four integrity management performance measures as part of the annual report. The rule also requires operators to report, as part of the annual report, detailed information regarding

[11] Final Regulatory Impact Analysis, ''Summary and Conclusions'', p. 61.

compression coupling failures. One of the performance measures—total number of leaks eliminated or repaired, categorized by cause—is already a part of the annual report form; however, the other information to be reported will require modifications to the annual report form. Therefore, PHMSA is issuing, in conjunction with this rulemaking, a 60-day notice to modify the annual report information collection, OMB Control Number 2137–0522. PHMSA seeks comment on the proposed modified annual report form.

III. National Transportation Safety Board

The National Transportation Safety Board (NTSB) is an independent agency that investigates major transportation accidents, including those occurring on pipelines. The NTSB makes recommendations to PHMSA when it concludes from investigation of pipeline accidents that additional regulatory actions would be appropriate to improve safety.

The NTSB submitted comments on this rulemaking on November 19, 2008. The NTSB supported the approach to distribution IM being taken by PHMSA and stated that ''overall, the NPRM provides a reasonable and logical approach that operators of distribution pipelines can use to develop and implement integrity management plans.'' The NTSB also identified three areas in which they concluded the proposed rule should be improved.

The NTSB considers that an effective leak management program, as required in this rule, must provide for use of equipment that prevents or mitigates leaks. The Board sees EFVs as equipment that should be used for this purpose. The NTSB acknowledges that the proposed rule's requirements for installation of EFVs implement the mandate in the PIPES Act of 2006, but considers that it should go farther. The NTSB recommends that the rule require the installation of EFVs on all new and replaced customer service lines, regardless of customer classification. This would include multi-family dwellings (*e.g.,* apartment buildings) and commercial properties. This is consistent with a recommendation the NTSB made in 2001 following investigation of a pipeline accident.

We have considered requirements for installation of EFVs for many years. PHMSA has conducted two cost-benefit studies. These studies reached contrary conclusions on whether a requirement to install EFVs was cost beneficial and demonstrated that the conclusion on whether EFV installation is cost-beneficial is highly sensitive to the assumptions and data used in the analysis. The PIPES Act required that PHMSA include in this final rule a requirement to install EFVs on new and replaced service lines serving single-family residences. This addresses the vast majority of gas distribution service lines, and this requirement has been included in this final rule. PHMSA has not studied separately the required installation of EFVs on properties other than single-family residences and is uncertain whether such a requirement can be justified on a cost-benefit basis.

The arguments for installing EFVs are that they are effective in preventing accidents caused by significant damage to a downstream service line and that they are inexpensive to install (when the line is newly installed or excavated for other reasons). The contrary argument is that an EFV protects only the service line in which it is installed and incidents causing significant damage to a service line are rare. Thus, a large number of EFVs must be installed, at a large cumulative expense, before one can say with confidence that it is likely that the presence of the installed valves will prevent an accident.

The potential consequences of accidents involving service line damage at multi-family or commercial properties are likely larger than those that would result from accidents on a service line serving a single-family residence. The likelihood that an individual service line would be damaged remains, however, small, and the likelihood that an EFV would prevent an accident at an individual installation is correspondingly small. There are far fewer multi-family and commercial properties than there are single-family residences. This could reduce the likelihood that an EFV would be expected to prevent an accident at such a property so that a cost-benefit analysis would conclude that requiring installation of the valves is not justified. Before imposing such a requirement, PHMSA would need to collect data from manufacturers of larger EFVs and from operators who currently install such valves and conduct a detailed cost-benefit analysis. These actions have not been completed, and PHMSA has not expanded the requirement in this final rule beyond the mandate in the PIPES Act.

The NTSB also recommended that the final rule be revised to address more explicitly the risks from compression couplings. The Board noted that it has investigated a number of accidents caused by pipe pulling out of compression couplings, and that several states have taken actions to require replacement or other actions to assure that compression coupling joints are safe. The NTSB recommended that the rule include specific guidance on how to identify and address problem compression couplings.

PHMSA agrees that there are reasons for concern regarding compression couplings. PHMSA issued an advisory bulletin on this subject on February 28, 2008. The NTSB acknowledged that this bulletin should help utilities identify future problems, but expressed concern that it is only advisory and that operators are not required to implement its suggestions.

PHMSA will encourage GPTC to review its guidance with respect to compression couplings and to improve that guidance, if needed. PHMSA has revised this final rule to require that operators report information on coupling failures as part of their annual report to PHMSA (see comment topic 1 above). PHMSA will consider the data from these reports to decide whether additional requirements relative to compression couplings are warranted. Any additional requirements related to compression couplings would be outside the scope of the proposed rule.

Finally, the NTSB recommended that the rule include specific requirements that operators address risks from directional drilling. PHMSA has not made this change for the same reasons as described above for compression couplings. Directional drilling is a type of excavation damage, a threat category operators are required to consider. We expect that GPTC will provide guidance on considering the threat of directional drilling.

IV. Advisory Committee

On December 12, 2008, PHMSA discussed the proposed rule with the Technical Pipeline Safety Standards Committee (TPSSC). The TPSSC is a statutorily mandated advisory committee that advises PHMSA about the technical feasibility, reasonableness and cost-effectiveness of its proposed regulations. PHMSA discussed some of the key comments received in response to the NPRM, *e.g.,* burdensome documentation requirements, performance through people, plastic pipe failure reporting and excess flow valves. These comments have been previously discussed in this document.

After careful consideration, the TPSSC voted unanimously to find the NPRM (with proposed changes as discussed at the meeting) and supporting regulatory evaluation technically feasible, reasonable, practicable, and cost effective. A transcript of the teleconference is

available in the docket for this rulemaking. The following tables summarize the major changes discussed at the meeting.

NPRM language	TAC recommendation	Final rule language
Burdensome Plan Documentation Requirements		
§ 192.1015 What records must an operator keep? Except for the performance measures records required in § 192.1007, an operator must maintain, for the useful life of the pipeline, records demonstrating compliance with the requirements of this subpart. At a minimum, an operator must maintain the following records for review during an inspection: (a) A written IM program in accordance with § 192.1005; (b) Documents supporting threat identification; (c) A written procedure for ranking the threats; (d) Documents to support any decision, analysis, or process developed and used to implement and evaluate each element of the IM program; (e) Records identifying changes made to the IM program, or its elements, including a description of the change and the reason it was made; and (f) Records on performance measures. However, an operator must only retain records of performance measures for ten years.	Limit documentation requirements to those in § 192.1005 and § 192.1007 Greatly reduce requirements in § 192.1015; focus on wording similar to § 192.1015(e) Clarify requirement to retain record of past versions of written IM program Language: § 192.1015 What records must an operator keep? (a) General records. Operator must maintain records demonstrating compliance with the requirements of this subpart for 10 years. This must include copies of superseded IM plans.	§ 192.1011 What records must an operator keep? An operator must maintain records demonstrating compliance with the requirements of this subpart for at least 10 years. This must include copies of superseded integrity management plans developed under this subpart.
Reporting Plastic Pipe Failures		
§ 192.1009 What must an operator report when plastic pipe fails? Each operator must report information relating to each material failure of plastic pipe (including fittings, couplings, valves and joints) no later than 90 days after failure. This information must include, at a minimum, location of the failure in the system, nominal pipe size, material type, nature of failure including any contribution of local pipeline environment, pipe manufacturer, lot number and date of manufacture, and other information that can be found in markings on the failed pipe. An operator must send the information report as indicated in § 192.1013. An operator must also report this information to the State pipeline safety authority in the State where the gas distribution pipeline is located.	Delete requirement Continue to rely on PPDC Promote broad communication of more expansive set of PPDC lessons Retain reporting of compression couplings failure Language: § 192.1009 What must an operator report when compression couplings fail? Each operator must report information relating to each failure of compression couplings annually by March 15, to PHMSA as part of the annual report required by § 191.11 beginning with the report submitted March 15, 20xx [Date to depend on when final rule is issued].	§ 192.1009 What must an operator report when compression couplings fail? Each operator must report, on an annual basis, information related to failure of compression couplings, excluding those that result only in non-hazardous leaks, as part of the annual report required by § 191.11 beginning with the report submitted March 15, 2011. This information must include, at a minimum, location of the failure in the system, nominal pipe size, material type, nature of failure including any contribution of local pipeline environment, coupling manufacturer, lot number and date of manufacture, and other information that can be found in markings on the failed coupling. An operator also must report this information to the state pipeline safety authority if a state exercises jurisdiction over the operator's pipeline.
Performance Through People		
(b) In considering the threat of inappropriate operation, the operator must evaluate the contribution of human error to risk and the potential role of people in preventing and mitigating the impact of events contributing to risk. This evaluation must also consider the contribution of existing DOT requirements applicable to the operator's system (e.g., Operator Qualification, Drug and Alcohol Testing) in mitigating risk.	Delete requirement, including reference to ''one call.'' Language: (d) Identify and implement measures to address risks. Determine and implement measures designed to reduce the risks from failure of its gas distribution pipeline system. These measures must include an effective leak management program (unless all leaks are repaired when found) and a damage prevention program required under § 192.614 of this part.	Requirement deleted, including reference to ''one call.'' (d) Identify and implement measures to address risks. Determine and implement measures designed to reduce the risks from failure of its gas distribution pipeline. These measures must include an effective leak management program (unless all leaks are repaired when found).

NPRM language	TAC recommendation	Final rule language
(d) Identify and implement measures to address risks. Determine and implement measures designed to reduce the risks from failure of its gas distribution pipeline system. These measures must include implementing an effective leak management program and enhancing the operator's damage prevention program required under § 192.614 of this part. To address risks posed by inappropriate operation, an operator's written IM program must contain a separate section with a heading 'Assuring Individual Performance'. In that section, an operator must list risk management measures to evaluate and manage the contribution of human error and intervention to risk (e.g., changes to the role or expertise of people), and implement measures appropriate to address the risk. In addition, this section of the written IM program must consider existing programs the operator has implemented to comply with § 192.614 (damage prevention programs); § 192.616 (public awareness); Subpart N of this Part (qualification of pipeline personnel), and 49 CFR Part 199 (drug and alcohol testing).	(f) Periodic Evaluation and Improvement. An operator must continually re-evaluate threats and risks on its entire system and consider the relevance of threats in one location to other areas. In addition, each operator must periodically evaluate the effectiveness of its program for assuring individual performance to reassess the contribution of human error to risk and to identify opportunities to intervene to reduce further the human contribution to risk (e.g., improve targeting of damage prevention efforts). Each operator must determine the appropriate period for conducting complete program evaluations based on the complexity of its system and changes in factors affecting the risk of failure. An operator must conduct a complete program reevaluation at least every five years. The operator must consider the results of the performance monitoring in these evaluations.	(f) Periodic Evaluation and Improvement. An operator must re-evaluate threats and risks on its entire pipeline and consider the relevance of threats in one location to other areas. Each operator must determine the appropriate period for conducting complete program evaluations based on the complexity of its system and changes in factors affecting the risk of failure. An operator must conduct a complete program reevaluation at least every five years. The operator must consider the results of the performance monitoring in these evaluations.
Definition of ''Damage''		
Damage means any impact or exposure resulting in the repair or replacement of an underground facility, related appurtenance, or materials supporting the pipeline.	Define ''excavation damage'' building on the definition in DIRT—increases clarity of reporting requirement. Language: Excavation Damage means any impact or exposure that results in the need to repair or replace an underground facility due to the weakening or the partial or complete destruction of the facility, including, but not limited to, the protective coating, lateral support, cathodic protection or the housing for the line device or facility.	Excavation Damage means any impact that results in the need to repair or replace an underground facility due to a weakening, or the partial or complete destruction, of the facility, including, but not limited to, the protective coating, lateral support, cathodic protection or the housing for the line device or facility.
Implementation Requirements		
§ 192.1005 What must a gas distribution operator (other than a master meter or LPG operator) do to implement this subpart? (a) Dates. No later than June 6, 2011 an operator of a gas distribution pipeline must develop and fully implement a written IM program. The IM program must contain the elements described in § 192.1007. (b) Procedures. An operator's program must have written procedures describing the processes for developing, implementing and periodically improving each of the required elements.	Retain same period Language: § 192.1005 What must a gas distribution operator (other than a master meter or LPG operator) do to implement this subpart? (a) Dates. No later than June 6, 2011 an operator of a gas distribution pipeline must develop and fully implement a written IM program. The IM program must contain the elements described in § 192.1007. (b) Procedures. An operator's program must have written procedures for developing, implementing and periodically improving the required elements.	§ 192.1005 What must a gas distribution operator (other than a master meter or small LPG operator) do to implement this subpart? No later than August 2, 2011 a gas distribution operator must develop and implement an integrity management program that includes a written integrity management plan as specified in § 192.1007.

NPRM language	TAC recommendation	Final rule language
Alternative Intervals for Periodic Actions		
§ 192.1017 When may an operator deviate from required periodic inspections under this part? (a) An operator may propose to reduce the frequency of periodic inspections and tests required in this part on the basis of the engineering analysis and risk assessment required by this subpart. Operators may propose reductions only where they can demonstrate that the reduced frequency will not significantly increase risk. (b) An operator must submit its proposal to the PHMSA Associate Administrator for Pipeline Safety or the State agency responsible for oversight of the operator's system. PHMSA, or the applicable State oversight agency, may accept the proposal, with or without conditions and limitations, on a showing that the adjusted interval provides a satisfactory level of pipeline safety.	Clarify intent as to responsibility for decision on waiver requests (States approve, no PHMSA review) Need to make sure that it is clear that overall level of safety is increased—not the level of safety on that particular line is equal or higher. System level rather than individual line. Language: § 192.1017 When may an operator deviate from required periodic inspections under this part? (a) An operator may propose to reduce the frequency of periodic inspections and tests required in this part on the basis of the engineering analysis and risk assessment required by this subpart. Operators may propose reductions only where they can demonstrate that the reduced frequency will not significantly increase risk. (b) An operator must submit its proposal to the PHMSA Associate Administrator for Pipeline Safety or, in the case of an intrastate pipeline facility regulated by the State, the appropriate State agency. The applicable state oversight agency may accept the proposal on its own authority, with or without conditions and limitations, on a showing that the adjusted interval provides a satisfactory level of pipeline safety.	§ 192.1013 When may an operator deviate from required periodic inspections under this part? (a) An operator may propose to reduce the frequency of periodic inspections and tests required in this part on the basis of the engineering analysis and risk assessment required by this subpart. (b) An operator must submit its proposal to the PHMSA Associate Administrator for Pipeline Safety or, in the case of an intrastate pipeline facility regulated by the State, the appropriate State agency. The applicable oversight agency may accept the proposal on its own authority, with or without conditions and limitations, on a showing that the operator's proposal, which includes the adjusted interval, will provide an equal or greater overall level of safety. (c) An operator may implement an approved reduction in the frequency of a periodic inspection or test only where the operator has developed and implemented an integrity management program that provides an equal or improved overall level of safety despite the reduced frequency of periodic inspections.

NPRM language	TAC recommendation	Final rule language
Program Requirements for Master Meters and LPG Operators		
(1) Infrastructure knowledge. The operator must demonstrate knowledge of the system's infrastructure, which, to the extent known, should include the approximate location and material of its distribution system. The operator must identify additional information needed and provide a plan for gaining knowledge over time through normal activities. (2) Identify threats. The operator must consider, at minimum, the following categories of threats (existing and potential): corrosion, natural forces, excavation damage, other outside force damage, material or weld failure, equipment malfunction and inappropriate operation. (3) Identify and implement measures to mitigate risks. The operator must determine and implement measures designed to reduce the risks from failure of its pipeline system. (4) Measure performance, monitor results, and evaluate effectiveness. The operator must develop and monitor performance measures on the number of leaks eliminated or repaired on its pipeline system and their causes. (5) Periodic evaluation and improvement. The operator must determine the appropriate period for conducting IM program evaluations based on the complexity of its system and changes in factors affecting the risk of failure. An operator must re-evaluate its entire program at least every five years. The operator must consider the results of the performance monitoring in these evaluations.	Retain separate treatment; revise wording to include the requirement to "rank risks" Language: (1) Infrastructure knowledge. The operator must demonstrate knowledge of the system's infrastructure, which, to the extent known, should include the approximate location and material of its distribution system. The operator must identify additional information needed and provide a plan for gaining knowledge over time through normal activities. (2) Identify threats. The operator must consider, at minimum, the following categories of threats (existing and potential): corrosion, natural forces, excavation damage, other outside force damage, material or weld failure, equipment malfunction and inappropriate operation. (3) Rank risks. The operator must evaluate the risks to its system and estimate the relative importance of each identified threat. (4) Identify and implement measures to mitigate risks. The operator must determine and implement measures designed to reduce the risks from failure of its pipeline system. (5) Measure performance, monitor results, and evaluate effectiveness. The operator must develop and monitor performance measures on the number of leaks eliminated or repaired on its pipeline system and their causes. (6) Periodic evaluation and improvement. The operator must determine the appropriate period for conducting IM program evaluations based on the complexity of its system and changes in factors affecting the risk of failure. An operator must re-evaluate its entire program at least every five years. The operator must consider the results of the performance monitoring in these evaluations.	(1) Knowledge. The operator must demonstrate knowledge of its pipeline, which, to the extent known, should include the approximate location and material of its pipeline. The operator must identify additional information needed and provide a plan for gaining knowledge over time through normal activities conducted on the pipeline (for example, design, construction, operations or maintenance activities). (2) Identify threats. The operator must consider, at minimum, the following categories of threats (existing and potential): corrosion, natural forces, excavation damage, other outside force damage, material or weld failure, equipment failure, and incorrect operation. (3) Rank risks. The operator must evaluate the risks to its pipeline and estimate the relative importance of each identified threat. (4) Identify and implement measures to mitigate risks. The operator must determine and implement measures designed to reduce the risks from failure of its pipeline. (5) Measure performance, monitor results, and evaluate effectiveness. The operator must monitor, as a performance measure, the number of leaks eliminated or repaired on its pipeline and their causes. (6) Periodic evaluation and improvement. The operator must determine the appropriate period for conducting IM program evaluations based on the complexity of its pipeline and changes in factors affecting the risk of failure. An operator must re-evaluate its entire program at least every five years. The operator must consider the results of the performance monitoring in these evaluations.

NPRM language	TAC recommendation	Final rule language
Excess Flow Valve Requirement		
§ 192.1011 When must an Excess Flow Valve (EFV) be installed? (a) General requirements. This section only applies to new or replaced service lines serving single-family residences. An EFV installation must comply with the requirements in § 192.381. (b) Installation required. The operator must install an EFV on the service line installed or entirely replaced after March 4, 2010, unless one or more of the following conditions is present: (1) The service line does not operate at a pressure of 10 psig or greater throughout the year; (2) The operator has prior experience with contaminants in the gas stream that could interfere with the EFV's operation or cause loss of service to a residence; (3) An EFV could interfere with necessary operation or maintenance activities, such as blowing liquids from the line; or (4) An EFV meeting performance requirements in § 192.381 is not commercially available to the operator.	Move provision to Subpart H this will lead to requiring implementation by MM; Explicitly address EFV installation requirement on branch service lines—clarify that EFVs are required for service lines servicing single family residences. Language: § 192.383 Excess flow valve installation. (a) Definitions. As used in this section: Replaced service line means a natural gas service line where the fitting that connects the service line to the main line is replaced or the piping connected to this fitting is replaced. Service line serving single-family residence means a natural gas service line beginning at the fitting that connects the service line to the main and serving only one single-family residence. (b) Installation required. An EFV installation must comply with the performance standards in § 192.381. The operator must install an EFV on new or replaced service lines serving single-family residences after February 2, 2010, unless one or more of the following conditions is present: (1) The service line does not operate at a pressure of 10 psig or greater throughout the year; (2) The operator has prior experience with contaminants in the gas stream that could interfere with the EFV's operation or cause loss of service to a residence; (3) An EFV could interfere with necessary operation or maintenance activities, such as blowing liquids from the line; or (4) An EFV meeting performance requirements in § 192.381 is not commercially available to the operator.	§ 192.383 Excess flow valve installation. (a) Definitions. As used in this section: Replaced service line means a natural gas service line where the fitting that connects the service line to the main is replaced or the piping connected to this fitting is replaced. Service line serving single-family residence means a natural gas service line that begins at the fitting that connects the service line to the main and serves only one single-family residence. (b) Installation required. An excess flow valve (EFV) installation must comply with the performance standards in § 192.381. The operator must install an EFV on any new or replaced service line serving a single-family residence after February 2, 2010, unless one or more of the following conditions is present: (1) The service line does not operate at a pressure of 10 psig or greater throughout the year; (2) The operator has prior experience with contaminants in the gas stream that could interfere with the EFV's operation or cause loss of service to a residence; (3) An EFV could interfere with necessary operation or maintenance activities, such as blowing liquids from the line; or (4) An EFV meeting performance standards in § 192.381 is not commercially available to the operator. (c) Reporting. Each operator must, on an annual basis, report the number of EFVs installed pursuant to this section as part of the annual report required by § 191.11.

V. Final Rule

The final rule revises 49 CFR Part 192 to add integrity management requirements applicable to distribution pipelines. This addresses statutory mandates and builds on previous similar requirements established for gas transmission pipelines. The final rule also adds a requirement that operators install excess flow valves (EFV) on all new and replaced residential service lines serving single residences, as required by the PIPES Act.

Section-by-Section Analysis

Section 192.383. Excess flow valve installation

This section currently requires that operators notify new customers of the availability of excess flow valves (EFV) and install a valve if the customer agrees to pay for the installation and any subsequent maintenance costs. This requirement has been superseded by the statutory mandate that PHMSA require operators to install such valves in all new and replaced residential service lines serving single-family residences. This section is revised to replace the notification requirement with the new requirement to install. Installation is not required if operating pressure is less than 10 psig, if the operator has experience with contaminants that would interfere with valve operation, if an EFV is likely to interfere with necessary operation or maintenance activities, or if an EFV meeting the performance standards of § 192.381 is not commercially available. The revised section also requires that each operator report the number of EFVs installed during each year in the annual report already required (§ 192.11).

A definition for ''service line serving single-family residence'' is added.

Subpart P—Gas Distribution Pipeline Integrity Management (IM)

A new subpart P is added that includes all of the new requirements applicable to distribution pipeline integrity management.

Section 192.1001. What definitions apply to this subpart?

This section adds a definition for ''excavation damage,'' which is one of the performance measures that operators must report to PHMSA as part of their annual reports. A common definition for this term is needed to assure consistency in the data collected and thus the ability for PHMSA to analyze the effectiveness of these regulations. The definition is based on the definition of damage used by the Common Ground Alliance for its Damage Information Reporting Tool (DIRT), a voluntary program used by some distribution pipeline operators to collect data on damages to underground facilities.

A definition of the term ''hazardous leak'' is added. The new rule will require operators to report annually the number of hazardous leaks repaired. Commenters have correctly noted that a

consistent definition will be important to assuring that this data is useful. Several comments suggested that PHMSA adopt the Gas Piping Technology Committee's (GPTC) Guide definition for a Grade 1 leak. This definition is already used by many operators to define hazardous leaks. PHMSA has followed the suggestion of the comments. The change to this section adds a definition similar to that of the GPTC Guide for Grade 1 leaks.

A definition for ''integrity management program'' is added. An integrity management program, as used within this rule, is an overall approach by an operator to ensure the integrity of its distribution system. The program includes an integrity management plan, which is revised periodically. The program also encompasses compliance with other relevant regulations. For some operators, the program may involve the selection of certain materials or adherence to professional standards that are not mandated by Federal regulation.

A definition for ''integrity management plan'' is added. An integrity management plan is a written explanation of the mechanisms the operator will use to implement its integrity management program and to ensure compliance with this rule.

A definition for ''small LPG operators'' is added. The new rule requires LPG operators with LPG distribution systems serving 100 or more customers to comply with the full integrity management program requirements. Small LPG operators, those with LPG distribution systems serving less than 100 customers from a single source must comply with the same requirements as master meter operators.

Section 192.1003. What do the regulations in this subpart cover?

This section describes the content of the new subpart and specifies which operators must comply with which sections. Master meter operators and small LPG operators are not required to meet all of the requirements applicable to other operators of distribution pipelines. The content of IM programs required of these operators is similar (described below), but somewhat simpler. Documentation requirements for these operators are different, consistent with their treatment in the rest of Part 192.

Section 192.1005. What must a gas distribution operator (other than a master meter or small LPG operator) do to implement this subpart?

This section requires operators of gas distribution pipelines and of LPG distribution pipelines serving 100 or more customers from a single source to develop and implement an IM program no later than 18 months after the effective date of this final rule. PHMSA recognizes that IM programs are likely to improve as operators gain experience. This does not mean, however, that it is acceptable for programs developed and implemented within 18 months to be incomplete. Those programs should address all required elements. PHMSA expects operators to revise their plans, following initial implementation, to reflect lessons that they learn through implementing them.

Section 192.1007. What are the required elements of an integrity management (IM) plan?

This section defines the minimum elements that IM plans developed by distribution pipeline operators (other than master meter and small LPG operators) must address. A plan must have written procedures for developing and implementing the following elements:

a. Knowledge. This section requires an operator to develop an understanding of its distribution pipeline. An operator must identify the characteristics of its pipeline's design and operations, and of the environment in which it operates, which are necessary to assess applicable threats and risks. This must include considering information gained from past design, operations, and maintenance.

This section requires that operators develop their understanding from reasonably available information. The rule does not require operators to retrieve many years of archived records or to conduct additional investigations (e.g., excavation) to discover information about the pipeline. Operators have considerable knowledge of their pipeline to support routine operations and maintenance, but this information may be distributed throughout the company, in possession of groups responsible for individual functions. Operators must assemble this information to the extent necessary to support development and implementation of their IM program.

PHMSA recognizes that there may be gaps in the knowledge an operator has when it develops its initial IM plan. Operators must identify these gaps and the additional information needed to improve their understanding. Operators are required to provide a plan for gaining that information over time through its normal activities of operating and maintaining their pipeline (*e.g.,* collecting information about buried components when portions of the pipeline must be excavated for other reasons). Operators must also develop a process by which the program will be periodically reviewed and refined, as needed.

b. Identify threats. Identification of the threats that affect, or could potentially affect, a distribution pipeline is key to assuring its integrity. Knowledge of applicable threats allows operators to evaluate the risks they pose and to rank those risks, allowing safety resources to be applied where they will be most effective.

This section requires that operators consider the general categories of threats that must now be reported on annual reports. Reporting has been required for many years, meaning that data are available regarding these threat categories. Operators are required to consider reasonably available information to identify threats that affect their pipeline or that could potentially affect it (*e.g.,* landslides in a hilly area with loose soils even if no landslide has been experienced). The section specifies data sources resulting from normal operation and maintenance that operators may consider in evaluating threats.

c. Evaluate and rank risk. This section requires that an operator evaluate the identified threats to determine their relative importance and rank the risks associated with its pipeline. Operators must consider the likelihood of threats as well as the consequences of a failure that might result from each threat. Consideration of consequences is important to assure that risks are properly ranked. A potential accident of relatively low likelihood but that would produce significant consequences may be a higher risk than an accident with somewhat greater likelihood but that cannot produce major consequences.

Operators may subdivide their pipeline into regions for purposes of this analysis. Such division may be appropriate when factors relevant to a threat vary within the pipeline. For example, the threat of corrosion is not applicable to portions of the pipeline made of plastic materials. The corrosion threat likely would be of different importance to metal portions of the pipeline that are coated and cathodically protected than it would be to any portions that are bare or unprotected. Operators are not, however, required to divide their

pipelines for purposes of analyzing risks.

d. Identify and implement measures to address risks. Operator IM programs must include measures designed to reduce the risk of failure from identified threats. These measures must include an effective leak management program (which most operators are already implementing) unless the operator already repairs all leaks when found.

e. Measure performance, monitor results, and evaluate effectiveness. Measuring performance is a key element of IM programs. This section requires operators to develop performance measures, including some that are specified for use by all operators. Measuring performance periodically allows operators to determine whether actions being taken to address threats are effective, or whether different or additional actions are needed.

f. Periodic Evaluation and Improvement. This element requires operators to periodically re-evaluate risks on their entire pipeline and to consider the relevance of threats in one location to other locations. Operators must consider the results of their performance monitoring in these evaluations, which must be performed at least once every five years. An operator must determine an appropriate period for conducting a complete program evaluation based on the complexity of its system. An operator should conduct a program evaluation any time there are changes in factors that would affect the risk of failure.

g. Report results. This section requires that operators include in their annual reports some of the performance measures required by the rule. PHMSA will use this data to evaluate the overall effectiveness of distribution IM requirements. (Note that one of the measures required to be reported—all leaks repaired, by cause—has historically been required on the annual report).

Section 192.1009. What must an operator report when compression couplings fail?

Compression couplings are mechanical fittings used to connect sections of pipe. Such couplings are often used to connect plastic pipe to metal pipe. Failure of compression couplings has resulted in a number of serious accidents on distribution pipelines. This section requires that operators report information related to failure of compression couplings (excluding failures that result only in non-hazardous leaks) on their annual report. PHMSA will use this data to evaluate the scope of problems related to compression couplings and will determine if changes to the regulations are appropriate to help prevent incidents caused by coupling failure.

Section 192.1011. What records must an operator keep?

This section requires that operators keep records for 10 years that demonstrate compliance with the requirements of this new subpart. The records must include superseded copies of IM plans.

Section 192.1013. When may an operator deviate from required periodic inspections under this part?

The operator's evaluation of threats and risk may identify additional actions that could be effective in reducing risk on distribution pipelines. This section allows operators to reduce the frequency of actions now required by this Part to be conducted periodically, to realign safety resources to better address risks. Operators must receive approval from their safety regulator (PHMSA or state, as appropriate) before they can reduce the required frequency, and must demonstrate that the overall effect of their proposed change will be an equal or greater level of pipeline safety.

This section requires an operator to submit a proposal that explains the desired alternative frequency for a required periodic inspection and that explains other actions the operator will take as part of the integrity management program to ensure an equal or greater overall level of pipeline safety. A proposal should include sufficient information to explain how the IM plan and IM program would be modified if the proposal is approved. States will use their authority to approve reductions in the frequency of safety actions otherwise required by Part 192.

Section 192.1015. What must a master meter or small liquefied petroleum gas (LPG) operator do to implement this subpart?

Most master meter operators are small entities and operating their gas distribution pipelines is not their principal occupation. These operators typically have limited on-staff technical pipeline expertise. These operators have historically been treated differently within Part 192. In particular, they have been subject to more limited documentation requirements. For example, master meter operators and operators of LPG distribution pipelines that serve fewer than 100 customers from a single source are not required to submit annual reports.

This section prescribes IM requirements applicable to these smaller operators. The major elements that these operators are required to include in their IM plans are the same as those in § 192.1007 applicable to other operators. The details of the elements are simplified somewhat, to reflect both the relative simplicity of these pipelines and the limited capability of the operators. For example, the required knowledge of their pipeline is focused on the approximate location and material of which it is constructed and required documentation of this knowledge is limited to documents showing the location and material of piping and appurtenances that are installed after the effective date of their IM programs and, to the extent known, in existence when the program becomes effective. These operators are not required to submit performance measures, which is consistent with their prior treatment with respect to annual reports.

PHMSA expects that the IM plans developed by these operators will be simpler than those developed by operators of more complex distribution pipelines. PHMSA is developing guidance suitable for use by master meter and small LPG operators to develop simple IM plans for their pipelines. This guidance will be made available via PHMSA's web site after this final rule is published.

VI. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule is published under the authority of the Federal Pipeline Safety Law (49 U.S.C. 60101 *et seq.*). Section 60102 authorizes the Secretary of Transportation to issue regulations governing design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. The integrity management program regulations are issued under this authority and address NTSB and DOT Inspector General recommendations. This rulemaking also carries out the mandates regarding distribution integrity management and excess flows valves under section 9 of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (Pub. L. No. 109–468, Dec. 29, 2006, codified at 49 U.S.C. § 60109(e)).

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866 directs all Federal agencies to consider the costs and benefits of ''significant regulatory actions.'' Federal agencies are directed

to develop a formal Regulatory Impact Analysis consistent with OMB Circular A–4 for all ''economically significant'' rules, or those rules estimated to have an impact of $100 million or more in any one year.

DOT considers this an ''economically significant'' regulatory action under section 3(f)(1) of Executive Order 12866 (58 FR 51735; October 4, 1993). This final rule is also significant under DOT's regulatory policies and procedures (44 FR 11034; February 26, 1979). PHMSA prepared a Regulatory Evaluation for this final rule and placed it in the public docket.

The rule's requirements would affect an estimated 9,343 natural gas operators with a combined total of 1,138,000 miles of mains and 60,970,000 services. Of these operators, 201 are large local gas utilities, 1,090 are small local gas utilities, 52 are LPG operators servicing 100 or more customers from a single source, and approximately 8,000 are master meter and small LPG systems. PHMSA determined that the approximately 1,142 gas operators and the 8,000 master meter operators and LPG systems are small.

The monetized benefits resulting from the final rule are estimated to be between $165 million and $170 million per year. Those benefits include:

- Reductions in the consequences of reportable incidents
- Reductions in the consequences of non-reportable incidents
- A reduction in the probability of a major catastrophic incident
- Reductions in lost natural gas
- Reductions in emergency response costs
- Reductions in evacuations
- Reductions in dig-ins impacting non-gas underground facilities
- The end of the existing EFV notification requirement

The costs of the final rule are estimated to be $130 million in the first year and $101 million in each subsequent year. Those costs cover:

- Development of an IM program
- Implementation of the IM program (data acquisition and analysis)
- Mitigation of risks (leak management, excess flow valve installation and other)
- Reporting to PHMSA and State Regulators
- Recordkeeping
- Management of the IM program.

The Regulatory Impact Analyses (RIA) finds that the rule is not expected to adversely affect the economy or the environment. The analysis finds that, for those costs and benefits that can be quantified, the present value of net benefits is expected to be between $21 million and $1.6 billion over a 50-year period after all of the requirements are implemented. Furthermore, the rule is expected yield positive net benefits if it results in eliminating only approximately 12.2 percent of the societal costs the first year, and about 9.5 percent in subsequent years.

C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), PHMSA must consider whether a rulemaking would have a significant effect on a substantial number of small entities. The IM program requirements in this rule apply to gas distribution pipeline operators and require operators of gas distribution pipelines to develop and implement IM plans that will better assure the integrity of their pipeline systems.

Many gas distribution pipeline operators meet the Small Business Administration's small business definition of 500 or fewer employees for natural gas distribution operators under North American Industry Classification System (NAICS) 221210. PHMSA estimates that the rule will affect approximately 9,090 small operators. These small operators can be separated into two categories: (1) Local gas distribution utilities with 12,000 or fewer services and (2) master meter and LPG systems. PHMSA estimates there are 1,090 small operators among the local gas distribution utilities with 12,000 or fewer services and approximately 8,000 master meter and LPG systems, all of which are small.

Furthermore, PHMSA estimates the rule will cost each of the 1,090 small operators and the 52 LPG operators serving 100 or more customers from a single source, on average, approximately $33,600 in the first year and $15,400 in each subsequent year. PHMSA also estimates that the rule will cost each of the 8,000 master meter and small LPG systems, on average, approximately $2,900 in the first year and $1,100 in each subsequent year. PHMSA does not have information on the operators' revenues and cannot estimate the economic impact the costs will have. The costs associated with the rule may be significant for at least some of the small entities, if the costs exceed 1 percent of the revenues. Therefore, PHMSA believes that the rule could result in a significant adverse economic impact for some of the smallest affected entities.

PHMSA has minimized costs for these small operators. As mentioned earlier, small operators' IM programs will be subject to more limited documentation requirements. PHMSA is also providing guidance for small operators. Additionally, industry is undertaking a number of initiatives that will help small entities comply with the proposed rule, including the preparation of guidance materials and a model IM program for distribution pipeline operators.

D. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) addresses the collection of information by the Federal government from individuals, small businesses and state and local governments and seeks to minimize the burdens such information collection requirements might impose. A collection of information includes providing answers to identical questions posed to, or identical reporting or record-keeping requirements imposed on ten or more persons, other than agencies, instrumentalities, or employees of the United States. In accordance with the requirements of the Paperwork Reduction Act, agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

This rule requires operators to report four distribution integrity management program (DIMP) performance measures in the annual report (Incident and Annual Reports for Gas Pipeline Operators. OMB Control Number: 2137–0522). All data required under this rule to be reported will be reported via the annual report.

One of the measures required to be reported—all leaks repaired, by cause—has historically been required as part of annual reports. The other information to be reported will require modifications to the annual report form. Therefore, PHMSA is also using this rulemaking as a 60-day notice to revise the annual report information collection, OMB Control Number 2137–0522. PHMSA seeks comment on the proposed modified annual report form, which is available in the docket for this rulemaking.

In addition, the rule also requires operators to report, as part of the annual report, detailed information regarding compression coupling failures. PHMSA has created a compression coupling failure addendum to be submitted with the annual report form, as needed. PHMSA also seeks comment on the proposed compression coupling failure addendum form. This form will also be part of the revised 2137–0522 information collection and is available in the docket for this rulemaking.

PHMSA estimates that the additional average time required for completing the annual report, beyond the time that gas distribution operators are already expending, is 6 hours per year per operator. This results in a burden increase of 8,058 hours per year for all 1,343 operators that have to comply with the annual report requirements. The required information can be reported electronically. Operators are permitted to keep records in any retrievable form. They may use the latest information technology to reduce the additional information-collection burden.

In addition to the reporting requirements, this final rule requires each affected operator to develop and maintain a written integrity management plan, which includes initial plan development, recordkeeping and updates. These non-reporting requirements are covered by Integrity Management Program for Gas Distribution Pipelines, OMB Control Number: 2137–0625. OMB assigned Control Number 2137–0625 to the information collection but withheld approval pending publication of this Final Rule, which addresses comments to the Notice. This Final Rule serves as a 30-day notice for the information collection, and PHMSA will forward an information collection package for OMB review concurrent with publication of this final rule.

Each operator, other than master meter operators and small LPG operators, must also collect and record one other specified performance measure and any other performance measures unique to the operator's pipeline that are needed to evaluate the effectiveness of the integrity management program. PHMSA estimates these tasks will require an additional 2,289 hours for all 9,343 operators. An explanation of all burden hour estimates is contained in the Paperwork Reduction Act Supporting Statement and the Regulatory Impact Analysis (RIA) available in the docket for this rulemaking.

E. Executive Order 13084

This final rule has been analyzed under principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this rule does not significantly or uniquely affect communities of Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13084 do not apply.

F. Executive Order 13132

PHMSA analyzed this final rule under the principles and criteria contained in Executive Order 13132 (Federalism). PHMSA issues pipeline safety regulations applicable to interstate and intrastate pipelines. The requirements in this rule apply to operators of distribution pipeline systems, primarily intrastate pipeline systems. Under 49 U.S.C. 60105, PHMSA cedes authority to enforce safety standards on intrastate pipeline facilities to a certified state authority. Thus, state pipeline safety regulatory agencies will be the primary enforcer of these safety requirements. Although some states have additional requirements that address IM issues, no state requires its distribution operators to have comprehensive IM programs similar to that required by this rule. Under 49 U.S.C. 60107, PHMSA provides grant money to participating states to carry out their pipeline safety enforcement programs. Although some states choose not to participate in the pipeline safety grant program, every state has the option to participate. This grant money is used to defray added safety program costs incurred by enforcing the requirements. We expect to increase money available to help states.

PHMSA has concluded this rule does not include any regulation that: (1) Has substantial direct effects on states, relationships between the national government and the states, or distribution of power and responsibilities among various levels of government; (2) imposes substantial direct compliance costs on states and local governments; or (3) preempts state law. Therefore, the consultation and funding requirements of Executive Order 13132 (64 FR 43255; August 10, 1999) do not apply.

This rule preempts any currently established state requirements in this area. States have the ability to augment pipeline safety requirements for pipelines, but are not able to approve safety requirements less stringent than those contained within this rule.

Although the consultation requirements do not apply, the states have played an integral role in helping develop these requirements. State pipeline safety regulatory agencies participated in the stakeholder groups that helped develop the findings on which this rule is based and provided guidance through NARUC in the form of a resolution. PHMSA action is consistent with this resolution.

G. Executive Order 13211

This final rule is not a ''significant energy action'' under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). It is not likely to have a significant adverse effect on supply, distribution, or energy use. Further, the Office of Information and Regulatory Affairs has not designated this rule as a significant energy action.

H. Unfunded Mandates

PHMSA estimates that this final rule does impose an unfunded mandate under the 1995 Unfunded Mandates Reform Act (UMRA). PHMSA estimates the rule to cost operators $155.1 million in the first year of the regulations, which is higher than the $100 million threshold (adjusted for inflation, currently estimated to be $141.3 million) in any one year. The Regulatory Impact Analysis performed under EO 12866 requirements also meets the analytical requirements under UMRA, and PHMSA has concluded the approach taken in this regulation is the least burdensome alternative for achieving our rule's objectives.

I. National Environmental Policy Act

PHMSA analyzed this final rule in accordance with section 102(2)(c) of the National Environmental Policy Act (42 U.S.C. 4332), the Council on Environmental Quality regulations (40 CFR 1500–1508), and DOT Order 5610.1C, and has determined that this action will not significantly affect the quality of the human environment. PHMSA conducted an Environmental Assessment on the NPRM and did not receive any comment on the preliminary analysis. The Environmental Assessment is available for review in the Docket.

List of Subjects in 49 CFR Part 192

Integrity management, Pipeline safety, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, PHMSA is amending Part 192 of Title 49 of the Code of Federal Regulations as follows:

PART 192 TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

■ 1. The authority citation for part 192 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60110, 60113, 60116, 60118, and 60137; and 49 CFR 1.53.

■ 2. Section 192.383 is revised to read as follows:

§ 192.383 Excess flow valve installation.

■ (a) Definitions. As used in this section:

Replaced service line means a natural gas service line where the fitting that connects the service line to the main is replaced or the piping connected to this fitting is replaced.

Service line serving single-family residence means a natural gas service line that begins at the fitting that connects the service line to the main and serves only one single-family residence.

(b) *Installation required.* An excess flow valve (EFV) installation must comply with the performance standards in § 192.381. The operator must install an EFV on any new or replaced service line serving a single-family residence after February 2, 2010, unless one or more of the following conditions is present:

(1) The service line does not operate at a pressure of 10 psig or greater throughout the year;

(2) The operator has prior experience with contaminants in the gas stream that could interfere with the EFV's operation or cause loss of service to a residence;

(3) An EFV could interfere with necessary operation or maintenance activities, such as blowing liquids from the line; or

(4) An EFV meeting performance standards in § 192.381 is not commercially available to the operator.

(c) *Reporting.* Each operator must, on an annual basis, report the number of EFVs installed pursuant to this section as part of the annual report required by § 191.11.

■ 3. In Part 192, a new subpart P is added to read as follows:

Subpart P—Gas Distribution Pipeline Integrity Management (IM)

Sec.

Subpart P—Gas Distribution Pipeline Integrity Management (IM)

§ 192.1001 What definitions apply to this subpart?

The following definitions apply to this subpart:

Excavation Damage means any impact that results in the need to repair or replace an underground facility due to a weakening, or the partial or complete destruction, of the facility, including, but not limited to, the protective coating, lateral support, cathodic protection or the housing for the line device or facility.

Hazardous Leak means a leak that represents an existing or probable hazard to persons or property and requires immediate repair or continuous action until the conditions are no longer hazardous.

Integrity Management Plan or *IM Plan* means a written explanation of the mechanisms or procedures the operator will use to implement its integrity management program and to ensure compliance with this subpart.

Integrity Management Program or *IM Program* means an overall approach by an operator to ensure the integrity of its gas distribution system.

Small LPG Operator means an operator of a liquefied petroleum gas (LPG) distribution pipeline that serves fewer than 100 customers from a single source.

§ 192.1003 What do the regulations in this subpart cover?

General. This subpart prescribes minimum requirements for an IM program for any gas distribution pipeline covered under this part, including liquefied petroleum gas systems. A gas distribution operator, other than a master meter operator or a small LPG operator, must follow the requirements in §§ 192.1005–192.1013 of this subpart. A master meter operator or small LPG operator of a gas distribution pipeline must follow the requirements in § 192.1015 of this subpart.

§ 192.1005 What must a gas distribution operator (other than a master meter or small LPG operator) do to implement this subpart?

No later than August 2, 2011 a gas distribution operator must develop and implement an integrity management program that includes a written integrity management plan as specified in § 192.1007.

§ 192.1007 What are the required elements of an integrity management plan?

A written integrity management plan must contain procedures for developing and implementing the following elements:

(a) *Knowledge.* An operator must demonstrate an understanding of its gas distribution system developed from reasonably available information.

(1) Identify the characteristics of the pipeline's design and operations and the environmental factors that are necessary to assess the applicable threats and risks to its gas distribution pipeline.

(2) Consider the information gained from past design, operations, and maintenance.

(3) Identify additional information needed and provide a plan for gaining that information over time through normal activities conducted on the pipeline (for example, design, construction, operations or maintenance activities).

(4) Develop and implement a process by which the IM program will be reviewed periodically and refined and improved as needed.

(5) Provide for the capture and retention of data on any new pipeline installed. The data must include, at a minimum, the location where the new pipeline is installed and the material of which it is constructed.

(b) *Identify threats.* The operator must consider the following categories of threats to each gas distribution pipeline: Corrosion, natural forces, excavation damage, other outside force damage, material, weld or joint failure (including compression coupling), equipment failure, incorrect operation, and other concerns that could threaten the integrity of its pipeline. An operator must consider reasonably available information to identify existing and potential threats. Sources of data may include, but are not limited to, incident and leak history, corrosion control records, continuing surveillance records, patrolling records, maintenance history, and excavation damage experience.

(c) *Evaluate and rank risk.* An operator must evaluate the risks associated with its distribution pipeline. In this evaluation, the operator must determine the relative importance of each threat and estimate and rank the risks posed to its pipeline. This evaluation must consider each applicable current and potential threat, the likelihood of failure associated with each threat, and the potential consequences of such a failure. An operator may subdivide its pipeline into regions with similar characteristics (e.g., contiguous areas within a distribution pipeline consisting of mains, services and other appurtenances; areas with common materials or environmental factors), and for which similar actions

likely would be effective in reducing risk.

(d) *Identify and implement measures to address risks.* Determine and implement measures designed to reduce the risks from failure of its gas distribution pipeline. These measures must include an effective leak management program (unless all leaks are repaired when found).

(e) *Measure performance, monitor results, and evaluate effectiveness.*

(1) Develop and monitor performance measures from an established baseline to evaluate the effectiveness of its IM program. An operator must consider the results of its performance monitoring in periodically re-evaluating the threats and risks. These performance measures must include the following:

(i) Number of hazardous leaks either eliminated or repaired as required by § 192.703(c) of this subchapter (or total number of leaks if all leaks are repaired when found), categorized by cause;

(ii) Number of excavation damages;

(iii) Number of excavation tickets (receipt of information by the underground facility operator from the notification center);

(iv) Total number of leaks either eliminated or repaired, categorized by cause;

(v) Number of hazardous leaks either eliminated or repaired as required by § 192.703(c) (or total number of leaks if all leaks are repaired when found), categorized by material; and

(vi) Any additional measures the operator determines are needed to evaluate the effectiveness of the operator's IM program in controlling each identified threat.

(f) *Periodic Evaluation and Improvement.* An operator must re-evaluate threats and risks on its entire pipeline and consider the relevance of threats in one location to other areas. Each operator must determine the appropriate period for conducting complete program evaluations based on the complexity of its system and changes in factors affecting the risk of failure. An operator must conduct a complete program re-evaluation at least every five years. The operator must consider the results of the performance monitoring in these evaluations.

(g) *Report results.* Report, on an annual basis, the four measures listed in paragraphs (e)(1)(i) through (e)(1)(iv) of this section, as part of the annual report required by § 191.11. An operator also must report the four measures to the state pipeline safety authority if a state exercises jurisdiction over the operator's pipeline.

§ 192.1009 What must an operator report when compression couplings fail?

Each operator must report, on an annual basis, information related to failure of compression couplings, excluding those that result only in non-hazardous leaks, as part of the annual report required by § 191.11 beginning with the report submitted March 15, 2011. This information must include, at a minimum, location of the failure in the system, nominal pipe size, material type, nature of failure including any contribution of local pipeline environment, coupling manufacturer, lot number and date of manufacture, and other information that can be found in markings on the failed coupling. An operator also must report this information to the state pipeline safety authority if a state exercises jurisdiction over the operator's pipeline.

§ 192.1011 What records must an operator keep?

An operator must maintain records demonstrating compliance with the requirements of this subpart for at least 10 years. The records must include copies of superseded integrity management plans developed under this subpart.

§ 192.1013 When may an operator deviate from required periodic inspections under this part?

(a) An operator may propose to reduce the frequency of periodic inspections and tests required in this part on the basis of the engineering analysis and risk assessment required by this subpart.

(b) An operator must submit its proposal to the PHMSA Associate Administrator for Pipeline Safety or, in the case of an intrastate pipeline facility regulated by the State, the appropriate State agency. The applicable oversight agency may accept the proposal on its own authority, with or without conditions and limitations, on a showing that the operator's proposal, which includes the adjusted interval, will provide an equal or greater overall level of safety.

(c) An operator may implement an approved reduction in the frequency of a periodic inspection or test only where the operator has developed and implemented an integrity management program that provides an equal or improved overall level of safety despite the reduced frequency of periodic inspections.

§ 192.1015 What must a master meter or small liquefied petroleum gas (LPG) operator do to implement this subpart?

(a) *General.* No later than August 2, 2011 the operator of a master meter system or a small LPG operator must develop and implement an IM program that includes a written IM plan as specified in paragraph (b) of this section. The IM program for these pipelines should reflect the relative simplicity of these types of pipelines.

(b) *Elements.* A written integrity management plan must address, at a minimum, the following elements:

(1) *Knowledge.* The operator must demonstrate knowledge of its pipeline, which, to the extent known, should include the approximate location and material of its pipeline. The operator must identify additional information needed and provide a plan for gaining knowledge over time through normal activities conducted on the pipeline (for example, design, construction, operations or maintenance activities).

(2) *Identify threats.* The operator must consider, at minimum, the following categories of threats (existing and potential): Corrosion, natural forces, excavation damage, other outside force damage, material or weld failure, equipment failure, and incorrect operation.

(3) *Rank risks.* The operator must evaluate the risks to its pipeline and estimate the relative importance of each identified threat.

(4) *Identify and implement measures to mitigate risks.* The operator must determine and implement measures designed to reduce the risks from failure of its pipeline.

(5) *Measure performance, monitor results, and evaluate effectiveness.* The operator must monitor, as a performance measure, the number of leaks eliminated or repaired on its pipeline and their causes.

(6) *Periodic evaluation and improvement.* The operator must determine the appropriate period for conducting IM program evaluations based on the complexity of its pipeline and changes in factors affecting the risk of failure. An operator must re-evaluate its entire program at least every five years. The operator must consider the results of the performance monitoring in these evaluations.

(c) *Records.* The operator must maintain, for a period of at least 10 years, the following records:

(1) A written IM plan in accordance with this section, including superseded IM plans;

(2) Documents supporting threat identification; and

(3) Documents showing the location and material of all piping and appurtenances that are installed after the effective date of the operator's IM program and, to the extent known, the location and material of all pipe and

appurtenances that were existing on the effective date of the operator's program.

Issued in Washington, DC on November 20, 2009 under Authority delegated in Part 1.

Cynthia L. Quarterman,

Administrator.

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Friday,
December 4, 2009

Part IV

Department of Housing and Urban Development

24 CFR Part 93
Housing Trust Fund; Allocation Formula; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 93

[Docket No. FR–5246–P–01]

RIN 2506–AC23

Housing Trust Fund; Allocation Formula

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Proposed rule.

SUMMARY: The Housing and Economic Recovery Act of 2008 establishes a Housing Trust Fund to be administered by HUD. The purpose of the fund is to provide grants to States to increase and preserve the supply of rental housing for extremely low- and very low-income families, including homeless families, and to increase homeownership for extremely low- and very low-income families. The Housing and Economic Recovery Act of 2008 charges HUD to establish through regulation the formula for the distribution of the Housing Trust Fund to States. The statute specifies that only certain factors are to be part of the formula, and assigns priority to certain factors. This proposed rule submits, for public comment, the proposed formula for allocating funds from the Housing Trust Fund.

DATES: *Comment due date:* February 2, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Marcia Sigal, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7158, Washington, DC 20410; telephone number 202–708–2684 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Housing and Economic Recovery Act of 2008, (Pub. L. 110–289, enacted July 30, 2008) (HERA) was major housing legislation enacted to reform and improve the regulation of Fannie Mae and Freddie Mac (the government-sponsored enterprises or GSEs), strengthen neighborhoods hardest hit by the foreclosure crisis, enhance mortgage protection and disclosures, and maintain the availability of affordable home loans. Section 1131 of HERA amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*) (Act) to add a new section 1337, entitled ''Affordable Housing Allocation'' and a new section 1338, entitled ''Housing Trust Fund.''

Section 1338 of the Act directs HUD to establish and manage a Housing Trust Fund, which is to be funded with amounts allocated by the GSEs as well as any amounts that may be appropriated, transferred, or credited to the Housing Trust Fund under any other provision of law. The purpose of the Housing Trust Fund is to provide grants to States for use to: (1) Increase and preserve the supply of rental housing for extremely low- and very low-income families, including homeless families; and (2) increase homeownership for extremely low- and very low-income families. The primary focus of the Housing Trust Fund is rental housing for extremely low- and very low-income households, as the Act provides that no more than 10 percent of each formula allocation may be expended on homeownership.

II. This Proposed Rule—New 24 CFR Part 93

HUD proposes to codify the regulations for the Housing Trust Fund in a new part 93 of title 24 of the Code of Federal Regulations. Further, HUD intends to implement the Housing Trust Fund through two separate rulemakings. Today's proposed rule would establish new 24 CFR part 93, and codify the formula for grant allocations under the Housing Trust Fund. A future rulemaking will propose the requirements and procedures governing operation of the Housing Trust Fund.

This section of the preamble highlights some of the key provisions of today's proposed rule.

A. General Provisions—Subpart A

Subpart A of new part 93 would set forth the general provisions applicable to the Housing Trust Fund (HTF) program. This subpart includes a definition section (§ 93.52) that establishes the definitions applicable to the HTF program. In keeping with the scope of this rulemaking, the definitions that would be established by the proposed rule pertain to the allocation formula, including the statutory definitions of ''extremely low-income renter household,'' ''shortage of standard rental units both affordable and available to extremely low-income renter households,'' and ''shortage of standard rental units both affordable and available to very low-income renter households,'' found in section 1338(f) of the Act. The list of defined terms will be expanded, as necessary, by HUD's forthcoming rule establishing the HTF programmatic requirements.

The proposed rule utilizes the statutory definitions of the terms ''extremely low-income renter household'' and ''very low-income renter household.'' Specifically, the proposed rule would define an extremely low-income renter household as a household whose income does not exceed 30 percent of the area median income (AMI). A very low-income renter household would be defined as a household whose income does not exceed 50 percent of AMI. Consistent with departmental practice for other of its programs, the proposed definitions of extremely low-income and very low-income renter households would provide for adjustment for family size as determined by the Secretary of HUD. The adjustments are standard factors that HUD applies to AMI before determining the extremely low-income and very low-income threshold. The adjustments for other family sizes are as follows: One person, 70 percent of AMI; two persons, 80 percent of AMI; three persons, 90 percent of AMI; four persons, base AMI; five persons, 108 percent of AMI; six persons, 116 percent of AMI; seven persons, 124 percent of AMI; and eight persons, 132 percent of AMI. The method is documented in the ''FY 2008 HUD Income Limits'' briefing materials available at *http://www.huduser.org/datasets/il/il08/index.html.*

The proposed rule would also track the statutory definition of the term ''shortage of standard rental units both affordable and available to extremely low-income renter households.'' Consistent with the statutory language, the determination of whether such a shortage exists would be based on the gap between (1) the number of units with complete plumbing and kitchen facilities with a rent that does not exceed 30 percent of the income of a household whose income is 30 percent of the AMI, that either are occupied by extremely low-income renter households or are vacant for rent; and (2) the number of extremely low-income renter households.

The proposed rule uses the ''30 percent of 30 percent'' terminology for consistency with the statutory language and conformity to housing industry practice to approximate the annual gross rent affordable to extremely low-income renter households; however, HUD notes that ''30 percent of 30 percent'' of the AMI equals nine percent of the AMI. In addition, the annual gross rent affordable to extremely low-income households is adjusted for the number of bedrooms. This is done to take into consideration that the number of bedrooms needed for a unit will vary with family size. This method will be documented and made available on the *http://www.huduser.org* Web site.

B. Allocation Formula—Subpart B

The allocation formula for the HTF program would be codified in subpart B of new 24 CFR part 93. The factors which determine the allocation of the formula incorporate the statutory factors found in section 1338(c)(3)(B) of the Act. The statutory factors are as follows:

(B)(i) The ratio of the shortage of standard rental units both affordable and available to extremely low-income renter households in the State to the aggregate shortage of standard rental units both affordable and available to extremely low-income renter households in all the States.

(ii) The ratio of the shortage of standard rental units both affordable and available to very low-income renter households in the State to the aggregate shortage of standard rental units both affordable and available to very low-income renter households in all the States.

(iii) The ratio of extremely low-income renter households in the State living with either (I) incomplete kitchen or plumbing facilities, (II) more than 1 person per room, or (III) paying more than 50 percent of income for housing costs, to the aggregate number of extremely low-income renter households living with either (IV) incomplete kitchen or plumbing facilities, (V) more than 1 person per room, or (VI) paying more than 50 percent of income for housing costs in all the States.

(iv) The ratio of very low-income renter households in the State paying more than 50 percent of income on rent relative to the aggregate number of very low-income renter households paying more than 50 percent of income on rent in all the States.

(v) The resulting sum calculated from the factors described in clauses (i) through (iv) shall be multiplied by the relative cost of construction in the State. For purposes of this subclause, the term 'cost of construction'—

(I) means the cost of construction or building rehabilitation in the State relative to the national cost of construction or building rehabilitation; and

(II) shall be calculated such that values higher than 1.0 indicate that the State's construction costs are higher than the national average, a value of 1.0 indicates that the State's construction costs are exactly the same as the national average, and values lower than 1.0 indicate that the State's cost of construction are lower than the national average.

The statutory formula factors are incorporated in proposed § 93.70. Section 1338(c)(3)(C) of the Act requires the formula to give priority emphasis and consideration to the first factor in section 1338(c)(3)(B)(i). The proposed rule reflects this priority consideration by weighting this factor higher than the other factors in the formula (see proposed § 93.70(b)(2)). Section 1338(c)(10)(A) of the Act requires that no more than 10 percent of the funds may be spent on homeownership activities, Section 1338(c)(10)(D) states that no more than 10 percent may be spent on administration, and Section 1338(c)(10)(A) states that a minimum of 75 percent of the funds for rental activities must be for the benefit only of extremely low-income families or families with incomes at or below the poverty line. Therefore, HUD proposes to ensure that the two factors in section 1338(c)(3)(B)(i) that address extremely low-income renters, the first and third factors, receive a combined weight of 75 percent, with priority emphasis on the first factor.

Section 1338(c)(4)(B) of the Act provides that in each fiscal year other than Fiscal Year 2009, the Secretary of HUD shall make a grant to each State in an amount that is equal to the amount determined for that State under the formula. Section 1303 of the Act defines the term ''State'' to include the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the United States Virgin Islands, America Samoa and Trust Territory of the Pacific Islands, and any other territory or possession of the United States. There are no remaining entities or jurisdictions in the Trust Territory of the Pacific Islands or other territories or possessions of the United States. Accordingly, these jurisdictions are not included in the proposed regulatory definition of the term ''State''.

Data for calculating the HTF program formula allocations must come from readily available standardized data sources. The U.S. Census, the American Community Survey, and the RSMeans cost survey, are the most readily available sources for the data necessary to calculate the formula allocations. However, the data available for insular areas (Guam, the Northern Mariana Islands, the United States Virgin Islands, and America Samoa) in the surveys differ from the data available from those sources for the 50 States, the Commonwealth of Puerto Rico, and the District of Columbia. To accommodate the differences in data, the proposed rule would establish a separate formula allocation process for the insular areas. The portion of the annual appropriation available for formula allocations for insular areas will be determined by establishing the ratio of renter households in the insular areas to the total number of renter households in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the insular areas. This is an appropriate way to establish the amount to be allocated to the insular areas, as these data (on

renter households) are readily available from the U.S. Census Bureau for all of the jurisdictions in the potential pool of grantees for this program; and the primary focus of the HTF is to produce or preserve housing to serve renter households. Note that because of the limited data available for insular areas, HUD's other formula programs similar to the HTF program also treat insular areas in a different way than other program grantees. For example, the HOME and Community Development Block Grants programs set aside specific percentage or dollar amounts for the insular areas. Proposed § 93.60(b) describes this allocation process.

As noted above, section 1338(c)(3)(B)(v) of the Act requires that the formula contain a multiplication factor reflecting the relative cost of construction in the State. The construction cost factor would be implemented at § 93.70(c)(5). HUD will use RSMeans construction cost data in making this calculation. The factor will be constructed by calculating a population weighted average of the construction costs in sampled metropolitan areas of each State as a proportion of the national average of such State averages. For example, if a State's weighted average RSMeans location adjustment factor is 0.818 and the national average of the State averages is 0.939, that State's base calculation, based on its share of housing need, would be multiplied times a ratio of 0.818/0.939. That is, the base calculation would be multiplied times 0.871. In contrast, a State with an average location adjustment factor of 1.145 would have its grant multiplied times a ratio of 1.145/0.939, thus its base calculation would be multiplied times 1.220.

Section 1338(c)(4)(C) of the Act establishes minimum allocations for the 50 States and the District of Columbia and provides that if the formula would allocate less than $3,000,000 to any of the 50 States or the District of Columbia in a fiscal year, the allocation for such State or the District of Columbia shall be $3,000,000, and the portion of State calculated allocations above $3,000,000 would be pro rata adjusted to match the amount available to be allocated. The minimum allocation established by the Act is found in proposed § 93.70(d).

III. Findings and Certifications

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled, ''Regulatory Planning and Review''). This rule was determined to be economically significant under the Executive Order. The docket file is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Persons with hearing or speech impairments may access the above telephone number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

The Economic Analysis prepared for this rule also is available for public inspection and on HUD's Web site at *http://www.hud.gov.* A summary of the findings contained in the Economic Analysis follows.

A. Assessing Effects of HUD's Discretionary Choices in Defining the Allocation Formula

In developing the allocation formula, HUD tested several alternatives to determine to what extent the resulting economic outcomes are sensitive to modest discretionary choices.

To address the statutory requirement that Factor 1 (shortage of extremely low-income (ELI) rental units) be given ''priority emphasis and consideration'' HUD proposes to assign to the factor 50 percent of the total weight. By further giving a 25 percent weight to Factor 3 (housing problems of ELI renters), the weights will correspond with the statute's 75 percent requirement for targeting rental housing funds toward ELI households. HUD proposes equal weights of 12.5 percent for Factor 2 (shortage of very low-income units) and Factor 4 (severe cost burdens of very low-income renters). The Department's proposed allocation formula can be considered to use a 50–12.5–25–12.5 weighting approach for the four factors.

To examine the importance of this weighting for allocation outcomes, HUD also ran the allocation formula with alternative weight structures. The first alternative was to retain the 50 percent priority weight for Factor 1 but remove the overweighting of Factor 3 so that it equals Factors 2 and 4, resulting in a 50–16.7–16.7–16.7 structure. HUD also tested two additional levels of preference for Factor 1, one applying a weight 10 percentage points below and the other 10 points above the proposed 50 percent value. Both of these alternatives provide equal weights for the other factors.

B. Selection of Alternative for Proposed Rule

HUD concluded that the allocation formula weights in the proposed rule accommodate States for which ELI needs take different forms, while responding as closely as feasible to the statutory requirement that 75 percent of rental assistance funds provided by the Housing Trust Fund should serve ELI households. HUD's analysis of the sensitivity of State allocations to various prioritizations of the needs of ELI renters under Factor 1 and Factor 3 revealed that about half of the States are not affected greatly by any of the weighting alternatives, as 23 to 30 States experiencing changes of less than 1 percent. For larger States, effects tend to be more pronounced, yet only rarely exceeding 3 percent relative to HUD's proposed formula.

C. Summary of Impacts

As noted, HERA is very specific about the factors to be used in the allocation formula and different weighting schemes have only modest impact on allocation grants. The largest impact on allocation grants is the amount made available for the program. The direct Federal cost of the program will be the amount eventually provided by Congress.

The proposed allocation formula is intended to target funds primarily to States with a shortage of rental housing affordable to extremely low-income households. Specifically, this program provides funding to add supply to market places where there is strong evidence of inadequate supply. This program represents a strong complement to the demand side program, the Housing Choice Voucher program, which provides a tenant based subsidy for primarily extremely low-income households to afford existing privately owned rental housing. The primary benefits of the HTF program are expected to be similar to the Housing Choice Voucher program. An evaluation of the impact of receiving a housing voucher versus not receiving a housing voucher has shown that the primary benefit of housing assistance programs is to reduce homelessness and housing cost burdens. Thus, the primary benefit of the HTF program will be to reduce the number of homeless families and individuals, as well as reducing the number of families paying a disproportionate share of their income for housing in relatively tight housing markets.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Under the HTF program, HUD makes grants to the relatively large entities, States and their designated housing entities, for the purposes of increasing and preserving the supply of rental housing and homeownership for eligible families. The focus of this proposed rule is the proposed formula for the HTF program. The formula allocations in this program are statutorily restricted to States and their designated entities. Therefore, the primary focus of this proposed rule is on these large entities. The States and State designated housing entities may, in turn, make funding available to recipients, which may include smaller entities (such as nonprofit or for-profit organizations). However, HUD does not anticipate that this proposed rule will place an undue burden on these smaller entities. The proposed rule, to a great extent, tracks the language of the authorizing statute. Accordingly, the proposed regulatory text reflects statutorily mandated requirements that HUD does not have the discretion to modify.

HUD has attempted to minimize the regulatory burden imposed for all entities participating in the HTF program. However, HUD also is cognizant that, as with all new programs, changes to these regulations may be necessary as the Department and participating entities gain experience with the HTF program. HUD will take into consideration the special needs and concerns of small entities in crafting any such future amendments, as it has done in developing this proposed rule. Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implements section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on State and local governments and is not required by statute, or preempts State law, unless the relevant requirements of Section 6 of the Executive Order are met. This rule does not have federalism implications, and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. This rule does not impose any Federal mandate on any State, local, or Tribal government or the private sector within the meaning of UMRA.

List of Subjects in 24 CFR Part 93

Administrative practice and procedure, Grant programs—housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD proposes to amend title 24 of the Code of Federal Regulations as follows:

1. Add new part 93 to read as follows:

PART 93—HOUSING TRUST FUND

Sec.

Subpart A—General Provisions

Subpart B—Allocation Formula

Authority: 12 U.S.C. 4567; 42 U.S.C. 3535(d).

Subpart A—General Provisions

§ 93.50 Purpose.

This part implements the Housing Trust Fund (HTF) program established under section 1338 of the Federal Housing Enterprises Financial Safety and Soundness Act, as amended by the Federal Housing Finance Regulatory Reform Act of 2008 (12 U.S.C. 4568) (Act). In general, under the HTF program, HUD allocates funds by formula to eligible States to increase and preserve the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing for extremely low-income and very low-income households, including homeless families.

§ 93.52 Definitions.

As used in this part:

Act means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4501 *et seq*).

Extremely low-income renter households means a household whose income is not in excess of 30 percent of the area median income, with adjustments for smaller and larger families, as determined by the Secretary.

Household means one or more persons occupying a housing unit.

Insular areas means Guam, the Northern Mariana Islands, the United States Virgin Islands, and American Samoa.

Poverty line is defined in section 673 of the Omnibus Budget Reconciliation Act of 1981 (42 U.S.C. 9902).

Secretary means the Secretary of Housing and Urban Development.

Shortage of standard rental units both affordable and available to extremely low-income renter households (1) Means for any State or other geographical area the gap between:

(i) The number of units with complete plumbing and kitchen facilities with a rent that does not exceed 30 percent of 30 percent of the adjusted area median income (AMI) as determined by the Secretary that either are occupied by extremely low-income renter households or are vacant for rent; and

(ii) The number of extremely low-income renter households.

(2) If the number of units described in paragraph (1)(i) of this definition exceeds the number of extremely low-income households described in paragraph (1)(ii) of this definition, there is no shortage.

Shortage of standard rental units both affordable and available to very low-income renter households (1) Means for any State or other geographical area the gap between:

(i) The number of units with complete plumbing and kitchen facilities with a rent that is greater than 30 percent of the income of a household whose income is 30 percent of the AMI, but does not exceed 30 percent of 50 percent of the AMI as determined by the Secretary that either are occupied by very low-income renter households (net of units occupied by extremely low-income households) or are vacant for rent; and

(ii) The number of very low-income renter households (net of extremely low-income households).

(2) If the number of units described in paragraph (1)(i) of this definition exceeds the number of very low-income households as described in subparagraph (1)(ii) of this definition, there is no shortage.

State means any State of the United States, the Commonwealth of Puerto Rico, the District of Columbia, and the insular areas.

Very low-income renter households means a household whose income is in excess of 30 percent but not greater than 50 percent of the AMI, with adjustments for smaller and larger families, as determined by the Secretary.

Subpart B—Allocation Formula

§ 93.55 Formula allocation.

(a) HUD will provide to the States allocations of funds in amounts determined by the formula described in this subpart.

(b) The amount of funds available for allocation by the formula is the balance remaining after providing for other purposes authorized by Congress, in accordance with the Act and appropriations.

§ 93.60 Allocations for the insular areas.

The allocation amount for each insular area is determined by multiplying the funds available times the ratio of renter households in each insular area to the total number of renter households in the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the insular areas. This allocation is not subject to adjustment pursuant to § 93.70(d).

§ 93.70 Allocations for the 50 States, the Commonwealth of Puerto Rico, and the District of Columbia.

(a) *Amounts available for allocations.* The amount of funds that is available for allocation by the formula to the 50 States, the Commonwealth of Puerto Rico, and the District of Columbia is determined using the most current data available from the U.S. Census Bureau that is available for the same year for all these geographic areas. The amount is equal to the balance of funds remaining after determining formula allocations for the insular areas under § 93.60. For purposes of subsections (b) and (c) of this section, the term ''State'' means any of the 50 United States, the Commonwealth of Puerto Rico, and the District of Columbia.

(b) *Allocations.* (1) Allocations to the States are determined using the four needs factors described in paragraphs (c)(1) through (c)(4) of this section, multiplying each factor by the amount available under paragraph (a) of this section by its priority weight, and summing the four factors for each State.

(2) The factor described in paragraph (c)(1) of this section is weighted 0.5. The factors described in paragraphs (c)(2) and (c)(4) of this section are weighted at 0.125 and the factor described in paragraph (c)(3) of this section is weighted at 0.25.

(3) The sum of the four needs factors for each State is then multiplied by the construction cost factor described in paragraph (c)(5) of this section and by the total amount of funds available for State allocations.

(c) *Formula factors*—(1) *Need factor one.* The ratio of the shortage of standard rental units both affordable and available to extremely low-income renter households in the State to the aggregate shortage of standard rental units both affordable and available to extremely low-income renter households in all the States.

(2) *Need factor two.* The ratio of the shortage of standard rental units both affordable and available to very low-income renter households in the State to the aggregate shortage of standard rental units both affordable and available to very low-income renter households in all the States.

(3) *Need factor three.* The ratio of:

(i) Extremely low-income renter households in the State living with either incomplete kitchen or plumbing facilities, more than one person per room, or paying more than 50 percent of income for housing costs, to:

(ii) The aggregate number of extremely low-income renter households living with either incomplete kitchen or plumbing facilities, more than one person per room, or paying more than 50 percent of income for housing costs in all the States.

(4) *Need factor four.* The ratio of very low-income renter households in the State paying more than 50 percent of income on rent relative to the aggregate number of very low-income renter households paying more than 50 percent of income on rent in all the States.

(5) *Construction cost factor.* The resulting sum calculated from the factors described in paragraphs (c)(1) through (c)(4) of this section shall be multiplied by the relative cost of construction in the State. For purposes of calculating this factor, the term ''cost of construction'':

(i) Means the cost of construction or building rehabilitation in the State relative to the national cost of construction or building rehabilitation; and

(ii) Is calculated so that values higher than 1.0 indicate that the State's construction costs are higher than the national average, a value of 1.0 indicates that the State's construction costs are exactly the same as the national average, and values lower than 1.0 indicate that the State's cost of construction are lower than the national average.

(d) *Minimum allocations.* If the formula amount determined for a fiscal year is less than $3,000,000 to any of the 50 States or the District of Columbia, then the allocation to that State or the District of Columbia is increased to the $3,000,000, and allocations to States, the Commonwealth of Puerto Rico, and the District of Columbia above $3,000,000 are adjusted by an equal amount on a pro rata basis.

§ 93.75 Federal Register notice of formula allocations.

Not later than 60 days after the date that HUD determines the formula amounts under this subpart, HUD will publish a notice in the **Federal Register** announcing the availability of the allocations to States.

Dated: November 4, 2009.

Mercedes M. Márquez,

Assistant Secretary for Community Planning and Development.

[FR Doc. E9–28984 Filed 12–3–09; 8:45 am]

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Federal Register

Friday,
December 4, 2009

Part V

Department of Homeland Security

6 CFR Part 5

Privacy Act of 1974: Implementation of Exemptions; Final Rules

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2009–0045]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—001 Arrival and Departure Information System of Records

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology system of records entitled the ''Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—001 Arrival and Departure Information System of Records'' from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—001 Arrival and Departure Information system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: *Effective Date:* This final rule is effective December 4, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Paul Hasson (202–298–5021), Privacy Officer, U.S. Visitor and Immigrant Status Indicator Technology, Washington, DC 20598. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking in the **Federal Register**, 72 FR 46921, August 22, 2007, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The system of records is the DHS/National Protections and Programs Directorate (NPPD)/U.S. Visitor and Immigrant Status Indicator Technology (US–VISIT)—001 Arrival and Departure Information system. The DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records notice was published concurrently in the **Federal Register**, 72 FR 47057, August 22, 2007. Comments were invited on both the notice of proposed rulemaking and the system of records notice. Public comments were received on the notice of proposed rulemaking and system of records notice.

Comments on the Notice of Proposed Rulemaking

DHS received eleven comments on the notice of proposed rulemaking (NPRM) (72 FR 46921, August 22, 2007) and seven comments on the system of records notice (SORN) (72 FR 47057, August 22, 2007). The NPRM and SORN received identical comments twice from the same two individuals. One comment was related to permanent resident alien cards and is unrelated to the proposed rulemaking. Two additional comments contained individuals' personal opinions on DHS' status within the Federal government that are unrelated to the proposed rulemaking. Several other commenters complained of the Department's use of Privacy Act exemptions under the Freedom of Information Act (FOIA). The SORN and NPRM relate to the Privacy Act and not FOIA. The proposed exemptions are standard law enforcement and national security exemptions currently being exercised by a large number of Federal law enforcement and intelligence agencies. Moreover, in appropriate circumstances the applicable exemptions may be waived, when compliance would not appear to interfere with or adversely affect the enforcement process.

Below is an analysis of each comment that specifically relate to this NPRM that is not addressed directly above.

An initial commenter expressed concern that inaccurate and irrelevant information could falsely target innocent individuals. DHS notes that occasionally in the course of an investigation into potential violations of Federal law, the accuracy of information obtained or introduced may be unclear, or the information may not be strictly relevant or necessary to a specific investigation, but in the interest of effective law enforcement, it is appropriate for the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records to retain all information that may aid in establishing patterns of unlawful activity. The DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records information serves as another important tool to support better determinations concerning potentially high-risk travelers that may require additional screening.

Another commenter stated that information in the background section of the notice, specifically a routine use for information sharing with the intelligence community, sharing to prevent identity theft, and sharing with foreign governments, was not present in the body of the SORN. This statement is inaccurate and sharing for those purposes can be found in routine use A, B, G and H. The commenter further states that there is no language in the SORN relating to the retention period for the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records data. This statement is also inaccurate and information relating to the retention period can be found under the Retention and Disposal section of the SORN. Further, the commenter goes on to contest the purpose and use of the information maintained in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records and all information within the SORN and disagrees with the language and truthfulness of the Department's justification. DHS has provided accurate information regarding purpose and use of information as well as all other information in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records.

One commenter suggested that the proposed exemptions could allow for errors and inaccuracy of information. DHS advises that travelers who believe that the information contained in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records or in any other DHS systems is erroneous may request correction of that information through the Traveler Redress Inquiry Program (TRIP) at *http://www.dhs.gov/trip* or via mail, facsimile, or e-mail in accordance with instructions provided on the Web site listed above or contact DHS/NPPD/US–VISIT directly.

Another commenter suggested that the potential for error and abuse is enormous because the information is regarded as being about non-citizens only. DHS extends administrative Privacy Act protections to individuals where information is maintained on both U.S. citizens, lawful permanent residents, and visitors, on whom a system of records maintains

information. This is the case with the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records and the reason DHS has issued the NPRM and SORN.

A concluding commenter stated that ''We have a right and a duty to ensure that we do not relinquish our Constitutional rights.'' DHS agrees and has established a number of administrative and policy checks and balances to further ensure that the use of the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records information remains within the appropriate bounds of the mission of DHS. In conjunction with the SORN published in the **Federal Register** 72 FR 47057, August 22, 2007, DHS has also posted on its Web site an updated Privacy Impact Assessment that fully informs the public about the uses of the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records including the privacy risks and the mitigation approaches to address any identified risks.

Comments on the System of Records Notice 72 FR 47057, August 22, 2007

Below is an analysis of each comment that specifically relate to this SORN that is not addressed directly above.

An initial commenter suggested that the routine uses permitting the sharing of information contained in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records should be clarified or expanded to include sharing with companies that have posted immigration bonds pertaining to aliens ''based on the traditional notions of fairness.'' DHS notes that access to the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records information is strictly regulated. Sharing ''based on the traditional notion of fairness'' is not within DHS' mission or based on a need to know. In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act and the routine uses outlined in the SORN, and consistent with DHS' information sharing limitations, all or a portion of the records or information contained in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records may be shared with other DHS components or outside of DHS with appropriate Federal, State, local, tribal, foreign, or international government agencies, or party after DHS determines that the receiving agency or party has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in the SORN for the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records.

Another commenter expressed that the exemption of one or more provisions of the Privacy Act is not necessary because information in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records record is already known to the subject. While this is generally true, individuals who desire access to their information in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records may submit a request to gain access.

DHS carefully reviewed all the public comments and the recommendations within the public comments. DHS has determined that since the information in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records is used primarily to facilitate the investigation of subjects of interest who may have violated their immigration status by remaining in the United States beyond their authorized stay; thereby supporting the several and varied missions and functions of DHS, including but not limited to: the enforcement of civil and criminal laws (including the immigration law); investigations, inquiries; national security and intelligence activities in support of the DHS mission to identify and prevent acts of terrorism against the United States, it is important that the exemptions remain in place and be waived only when compliance would not interfere with or adversely affect the law enforcement purposes of the system and the overall law enforcement process.

Having taken into consideration public comments resulting from this NPRM and SORN, as well as the Department's position on these public comments, DHS will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

■ For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for part 5 continues to read as follows:

Authority: Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.;* 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. At the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, add the following new paragraph 41 to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

41. The DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records notice is a system for the storage and use of biographic, biometric indicator, and encounter data consolidated from various systems regarding aliens who have applied for entry, entered, or departed the United States. Information in the DHS/NPPD/US–VISIT—001 Arrival and Departure Information system of records notice is used primarily to facilitate the investigation of subjects of interest who may have violated their immigration status by remaining in the United States beyond their authorized stay; thereby supporting the several and varied missions and functions of DHS, including but not limited to: the enforcement of civil and criminal laws (including the immigration law); investigations, inquiries; national security and intelligence activities in support of the DHS mission to identify and prevent acts of terrorism against the United States. The information is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5) and (e)(8); (f); and (g) pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H); and (f) pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(3) and (k)(5). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation; and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the

individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identities of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G) and (H) (Agency Requirements), and (f) (Agency Requirements) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant, timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: November 25, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–28910 Filed 12–3–09; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2009–0044]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—003 Technical Reconciliation Analysis Classification System of Records

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology system of records entitled the ''Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—003 Technical Reconciliation Analysis Classification System of Records'' from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/National Protections and Programs Directorate/U.S. Visitor and Immigrant Status Indicator Technology—003 Technical Reconciliation Analysis Classification system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: *Effective Date:* This final rule is effective December 4, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Paul Hasson (202–298–5021), Privacy Officer, U.S. Visitor and Immigrant Status Indicator Technology, Washington, DC 20598. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking in the **Federal Register,** 73 FR 33928, June 16, 2008, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The system of records is the DHS/National Protections and Programs Directorate (NPPD)/U.S. Visitor and Immigrant Status Indicator Technology (US–VISIT)—003 Technical Reconciliation Analysis Classification system. The DHS/NPPD/US–VISIT—003 Technical Reconciliation Analysis Classification system of records notice was published concurrently in the **Federal Register,** 73 FR 34028, June 16, 2008, and comments were invited on both the notice of proposed rulemaking and system of records notice. No comments were received on the notice of proposed rulemaking. Comments were received on the system of records notice.

Public Comments

DHS received no comments on the notice of proposed rulemaking.

DHS received three public comments on the system of records notice. Two of the public comments were related to an individual's immigration status and unrelated to the proposed rulemaking. The third comment was an individual's personal opinion on illegal immigration and unrelated to the proposed rulemaking.

DHS will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

■ For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for part 5 continues to read as follows:

Authority: Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.;* 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. At the end of Appendix C to Part 5, Exemption of Record Systems under the Privacy Act, add the following new paragraph ''42'':

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

42. The DHS/NPPD/US–VISIT—003 Technical Reconciliation Analysis Classification system of records (TRACS) consists of stand alone database and paper files that will be used by DHS and its components. This system of records will be used to perform a range of information management and analytic functions involving collecting, verifying, and resolving tracking of data primarily on individuals who are not United States citizens or legal permanent residents (LPRs). However, it will contain data on: (1.) U.S. citizens or LPRs who have a connection to the DHS mission (e.g., individuals who have submitted a visa application to the UK, or have made requests for a license or credential as part of a background check or security screening in connection with their hiring or retention, performance of a job function or the issuance of a license or credential for employment at DHS); (2.) U.S. citizens and LPRs who have an incidental connection to the DHS mission (e.g., individuals living at the same address as individuals who have remained in this country beyond their authorized stays); and (3.) individuals who have, over time, changed their status and became U.S. citizens or LPRs. The DHS/NPPD/US–VISIT—003 Technical Reconciliation Analysis Classification system of records is managed and maintained by the US–VISIT Program. The data contained in the DHS/NPPD/US–VISIT—003 Technical Reconciliation Analysis Classification system of records is primarily derived from DHS/NPPD/U.S–VISIT—001 Arrival and Departure Information System (ADIS); DHS/CBP—011 TECS; DHS/ICE—001 Student and Exchange Visitor Information System (SEVIS); DHS/ICE/CBP/USCIS—001—03 Enforcement Operational Immigration Records (ENFORCE/IDENT); DHS/ICE—011 Removable Alien Records System (RARS); DHS/USCIS—001 Alien File (A–File) and Central Index System (CIS); DHS/USCIS—007 Benefits Information System covering Computer Linked Application Information Management System 3 (Claims 3) and Computer Linked Application Information Management System 4 (Claims 4); DHS/USCIS Refugees, Asylum & Parole System (RAPS); and from the Department of State's Consolidated Consular Database (CCD). The DHS/NPPD/US–VISIT—003 Technical Reconciliation Analysis Classification system of records also contains data from web searches for addresses and phone numbers. This data is collected by, on behalf of, in support of, or in cooperation with DHS and its components. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f); and (g) pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), and (e)(4)(H) (Agency Requirements) because portions of this system are exempt from the individual access provisions of subsection (d) which exempts providing access because it could alert a subject to the nature or existence of an investigation, and thus there could be no procedures for that particular data. Procedures do exist for access for those portions of the system that are not exempted.

(g) From subsection (e)(4)(I) (Agency Requirements) because providing such source information would impede enforcement or intelligence by compromising the nature or existence of a confidential investigation.

(h) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(i) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures and evidence.

(j) From subsection (f) (Agency Rules) because portions of this system are exempt from the access and amendment provisions of subsection (d).

(k) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: November 23, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–28913 Filed 12–3–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2009–0128]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/U.S. Coast Guard—013 Marine Information for Safety and Law Enforcement System of Records

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a Department of Homeland Security/U.S. Coast Guard system of records entitled the ''Department of Homeland Security/U.S. Coast Guard—013 Marine Information for Safety and Law Enforcement System of Records'' from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/U.S. Coast Guard—013 Marine Information for Safety and Law Enforcement system from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: *Effective Date:* This final rule is effective December 4, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Sherry A. Richardson (202–475–3515), Privacy Officer, U.S. Coast Guard. For privacy issues contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking in the **Federal Register,** 74 FR 30241, June 25, 2009, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The system of records is the DHS/U.S. Coast Guard (USCG)—013 Marine Information for Safety and Law Enforcement system. The DHS/USCG—013 Marine Information for Safety and Law Enforcement system of records notice was published concurrently in the **Federal Register,** 74 FR 30305, June 25, 2009. Comments were invited on both the notice of proposed rulemaking and the system of records notice. No comments were received.

Public Comments

DHS received no comments on the notice of proposed rulemaking or the system of records notice. DHS will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

■ For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.;* Public Law 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. Add at the end of Appendix C to Part 5, the following new paragraph 43 to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

43. The DHS/USCG—013 Marine Information for Safety and Law Enforcement system of records consists of electronic and paper records and will be used by DHS and its components. The DHS/USCG—013 Marine Information for Safety and Law Enforcement system of records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; national security and intelligence activities. The DHS/USCG—013 Marine Information for Safety and Law Enforcement system of records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5) and (e)(8); (f); and (g) pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H); (I); and (f) pursuant to 5 U.S.C. 552a(k)(2). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of an investigation, thereby interfering with the related investigation and law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information would impede law enforcement in that it could compromise investigations by: revealing the existence of an otherwise confidential investigation and thereby provide an opportunity for the subject of an investigation to conceal evidence, alter patterns of behavior, or take other actions

that could thwart investigative efforts; reveal the identity of witnesses in investigations, thereby providing an opportunity for the subjects of the investigations or others to harass, intimidate, or otherwise interfere with the collection of evidence or other information from such witnesses; or reveal the identity of confidential informants, which would negatively affect the informant's usefulness in any ongoing or future investigations and discourage members of the public from cooperating as confidential informants in any future investigations.

(f) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS' ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal, and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act relating to individuals' rights to access and amend their records contained in the system. Therefore DHS is not required to establish rules or procedures pursuant to which individuals may seek a civil remedy for the agency's: refusal to amend a record; refusal to comply with a request for access to records; failure to maintain accurate, relevant timely and complete records; or failure to otherwise comply with an individual's right to access or amend records.

Dated: November 23, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–28911 Filed 12–3–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2009–0129]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/U.S. Coast Guard—030 Merchant Seaman's Records System of Records

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a Department of Homeland Security/U.S. Coast Guard system of records entitled the ''Department of Homeland Security/U.S. Coast Guard—030 Merchant Seaman's Records System of Records'' from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the Department of Homeland Security/U.S. Coast Guard—030 Merchant Seaman's Records system from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: *Effective Date:* This final rule is effective December 4, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Sherry A. Richardson (202–475–3515), Privacy Officer, U.S. Coast Guard. For privacy issues contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking in the **Federal Register**, 74 FR 30243, June 25, 2009, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The system of records is the DHS/U.S. Coast Guard (USCG)—030 Merchant Seaman's Records system. The DHS/USCG—030 Merchant Seaman's Records system of records notice was published concurrently in the **Federal Register**, 74 FR 30308, June 25, 2009. Comments were invited on both the notice of proposed rulemaking and the system of records notice. No comments were received.

Public Comments

DHS received no comments on the notice of proposed rulemaking or the system of records notice. DHS will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

■ For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.;* Public Law 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. Add at the end of Appendix C to Part 5, the following new paragraph 44 to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

44. The DHS/USCG—030 Merchant Seaman's Records system of records consists of electronic and paper records and will be used by DHS and its components. The DHS/USCG—030 Merchant Seaman's Records system of records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under. The DHS/USCG—030 Merchant Seaman's Records system of records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, State, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a(k)(2). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation, and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or

evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, to the existence of the investigation, and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements), and (f) (Agency Rules) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Dated: November 23, 2009.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–28912 Filed 12–3–09; 8:45 am]

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H.R. 955/P.L. 111–99

To designate the facility of the United States Postal Service located at 10355 Northeast Valley Road in Rollingbay, Washington, as the ''John 'Bud' Hawk Post Office''. (Nov. 30, 2009; 123 Stat. 3011)

H.R. 1516/P.L. 111–100

To designate the facility of the United States Postal Service located at 37926 Church Street in Dade City, Florida, as the ''Sergeant Marcus Mathes Post Office''. (Nov. 30, 2009; 123 Stat. 3012)

H.R. 1713/P.L. 111–101

To name the South Central Agricultural Research Laboratory of the Department of Agriculture in Lane, Oklahoma, and the facility of the United States Postal Service located at 310 North Perry Street in Bennington, Oklahoma, in honor of former Congressman Wesley ''Wes'' Watkins. (Nov. 30, 2009; 123 Stat. 3013)

H.R. 2004/P.L. 111–102

To designate the facility of the United States Postal Service located at 4282 Beach Street in Akron, Michigan, as the ''Akron Veterans Memorial Post Office''. (Nov. 30, 2009; 123 Stat. 3014)

H.R. 2215/P.L. 111–103

To designate the facility of the United States Postal Service located at 140 Merriman Road in Garden City, Michigan, as the ''John J. Shivnen Post Office Building''. (Nov. 30, 2009; 123 Stat. 3015)

H.R. 2760/P.L. 111–104

To designate the facility of the United States Postal Service located at 1615 North Wilcox Avenue in Los Angeles, California, as the ''Johnny Grant Hollywood Post Office Building''. (Nov. 30, 2009; 123 Stat. 3016)

H.R. 2972/P.L. 111–105

To designate the facility of the United States Postal Service located at 115 West Edward Street in Erath, Louisiana, as the ''Conrad DeRouen, Jr. Post Office''. (Nov. 30, 2009; 123 Stat. 3017)

H.R. 3119/P.L. 111–106

To designate the facility of the United States Postal Service located at 867 Stockton Street in San Francisco, California, as the ''Lim Poon Lee Post Office''. (Nov. 30, 2009; 123 Stat. 3018)

H.R. 3386/P.L. 111–107

To designate the facility of the United States Postal Service located at 1165 2nd Avenue in Des Moines, Iowa, as the ''Iraq and Afghanistan Veterans Memorial Post Office''. (Nov. 30, 2009; 123 Stat. 3019)

H.R. 3547/P.L. 111–108

To designate the facility of the United States Postal Service located at 936 South 250 East in Provo, Utah, as the ''Rex E. Lee Post Office Building''. (Nov. 30, 2009; 123 Stat. 3020)

S. 748/P.L. 111–109

To redesignate the facility of the United States Postal Service located at 2777 Logan Avenue in San Diego, California, as the ''Cesar E. Chavez Post Office''. (Nov. 30, 2009; 123 Stat. 3021)

S. 1211/P.L. 111–110

To designate the facility of the United States Postal Service located at 60 School Street, Orchard Park, New York, as the ''Jack F. Kemp Post Office Building''. (Nov. 30, 2009; 123 Stat. 3022)

S. 1314/P.L. 111–111

To designate the facility of the United States Postal Service located at 630 Northeast Killingsworth Avenue in Portland, Oregon, as the ''Dr. Martin Luther King, Jr. Post Office''. (Nov. 30, 2009; 123 Stat. 3023)

S. 1825/P.L. 111–112

To extend the authority for relocation expenses test programs for Federal employees, and for other purposes. (Nov. 30, 2009; 123 Stat. 3024)

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